the facts of the case, documents in our possession, statutory interpretation, and the above case law, it seems unlikely than any fact finder would find Mr. Jones' liable for his own suicide or more than fifty percent responsible for his death. Thus, IDC will likely be unable to convince a factfinder that their affirmative defenses have any merit.

Applicant Details

First Name	**Evan**
Middle Initial	**M**
Last Name	**Brown**
Citizenship Status	**U. S. Citizen**
Email Address	**ebrown4@law.gwu.edu**
Address	**Address** Street **818 N Quincy St., Unit 1004** City **Arlington** State/Territory **Virginia** Zip **22203** Country **United States**
Contact Phone Number	**3176271031**

Applicant Education

BA/BS From	**Indiana University-Bloomington**
Date of BA/BS	**May 2019**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 1, 2022**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Energy and Environmental Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**George Washington Law School Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Jernigan, Ben
John_Jernigan@dcd.uscourts.gov
McBirney, Jimmy
jimmy.s.mcbirney@usdoj.gov
202-307-2587
Manns, Jeffrey
jmanns@law.gwu.edu
Gilligan, Francis
francis.a.gilligan.civ@mail.mil

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Evan Brown
Ebrown4@law.gwu.edu
(317) 627-1031

Address:
402 N Meridian St. #B306
Indianapolis, IN 46204

The Honorable Jamar K. Walker
U.S. District Court
Eastern District of Virginia
Walter E. Hoffman
United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a graduate of the George Washington University Law School and the term clerk for Judge Elizabeth F. Tavitas on the Indiana Court of Appeals. I am applying to serve as your clerk for the August 2024 term. As a clerk, I offer extensive litigation and judicial experience, excellent writing and research skills, and a passion for public service. In addition, though I am barred in Indiana, I am a former resident of San Diego, and I will be sitting for the California Bar Exam in February 2023.

My litigation experience has prepared me to bring high-caliber assistance to your chambers. As an appellate clerk with federal judicial internship experience in a district court, I am adept at drafting opinions that demonstrate succinct writing, command of federal law and procedure, and require minimal editing and revision. My strength as a writer is further demonstrated by my performance in law school, where I wrote the top-scoring brief in the 2020 George Washington Law School First-Year Student Moot Court Competition and a well-received Note for the Journal of Energy and Environmental Law.

Further, I am committed to serving the public interest. In law school, I accrued over 500 hours of pro bono work. After clerking, I will apply for a litigating position with the Department of Justice Attorney General's Honors Program in the Environment and Natural Resources Division. I will bring that same passion for public service as a law clerk with your chambers.

Attached to this application are: my resume; my law school and undergraduate transcripts; a moot court brief for the Eleventh Circuit; and letters of recommendation from (1) Jeffrey Manns and Francis A Gilligan, professors at the George Washington University Law School; (2) Jimmy S. McBirney, Senior Trial Counsel at the U.S. Department of Justice's National Courts Section; and (3) Ben Jernigan, who was my supervising clerk when I interned for Judge Rudolph Contreras on the D.C. District Court.

My clerkship and litigation experience, writing and research skills, and passion for public service make me a well-qualified candidate for a clerkship with your chambers. I appreciate your consideration, and I look forward to speaking with you further.

Respectfully,

Evan Brown

Evan Brown

Ebrown4@law.gwu.edu

Address:
402 N. Meridian St. #306
Indianapolis, IN 46204

EDUCATION

George Washington University Law School, Washington, DC (*Honors*)
J.D., May 2022, *Graduate with Honors*
GPA: 3.78, George Washington Scholar (Top 11%)
Activities: Moot Court Board, Journal of Energy and Environmental Law, GW Law Bands (electric bass)
Awards: Gold Presidential Service Award (500 pro bono hours)

Indiana University, Bloomington, IN (*Graduate with Highest Distinction*)
BS in Business, May 2019
GPA: 3.92, Kelley School of Business
Awards: Presidential Scholar, Hutton Honors Scholar, Provost Scholar

EXPERIENCE

Judge Elizabeth F. Tavitas, Indiana Court of Appeals, Indianapolis, IN
Law Clerk, September 2022 – September 2024
- Analyzes briefs on appeal and performs legal research to draft judicial opinions
- Proofreads and cite-checks co-clerks' drafts

Judge Rudolph Contrereas, D.C. District Court, Washington, D.C.
Judicial Intern, January 2022 – April 2022
- Drafted two and a half opinions resolving motions to dismiss and motions to remand
- Supported clerks in drafting motions for summary judgment, motions in limine, and motions to suppress with supplemental research, cite-checking, and proofreading

U.S. EPA Office of Enforcement and Compliance Assurance
Law Clerk, January 2021 – April 2022; September 2021 – December 2021
- Drafted memorandum on the district courts' authority to issue nationwide injunctions for the Office of General Counsel
- Analyzed federal low-income housing and lead-based paint law to inform EPA's collaboration with HUD on environmental justice policy
- Researched Resource Conservation and Recovery Act's (RCRA's) universal waste storage requirements to draft memorandum in support of Notice of Violation

U.S. Department of Justice, National Courts Section, Washington, DC
Law Clerk, May 2021 — July 2021
- Drafted government motions for judgment on the administrative record, motions to dismiss, and bench memoranda in bid protests and contract disputes
- Researched Federal Rules of Evidence to support government's motion in limine and *Daubert* hearing before the Court of Federal Claims, leading to the exclusion of expert testimony

Professor Jeffrey Manns, Washington, DC
Research Assistant, May 2020– October 2020
- Researched cost-benefit analysis in federal rulemaking and drafted research report to inform law review

Brown Law Office, Indianapolis, IN
Law Clerk, May 2020– August 2020
- Researched Indiana Evidence Rules 602, 701, and 702 to draft motion in limine to exclude expert and lay testimony, resulting in settlement

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G33221649
Date of Birth: 02-NOV

Record of: Evan M Brown

Student Level: Law
Admit Term: Fall 2019

Issued To: EVAN BROWN
EBROWN4@GWU.EDU

Date Issued: 31-MAY-2022

Page: 1

REFNUM:75047204

Current College(s):Law School
Current Major(s): Law

Degree Awarded: J D 15-MAY-2022
With Honors
Major: Law

JD RANK: 63/549

GEORGE WASHINGTON UNIVERSITY CREDIT:

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2019			
	Law School		
	Law		
LAW 6202	Contracts Swaine	4.00	B+
LAW 6206	Torts Suter	4.00	A
LAW 6212	Civil Procedure Gutman	4.00	A-
LAW 6216	Fundamentals Of Lawyering I Gullman	3.00	B-
Ehrs	15.00 GPA-Hrs 15.00 GPA 3.467		
CUM	15.00 GPA-Hrs 15.00 GPA 3.467		
Spring 2020			
	Law School		
	Law		
LAW 6208	Property Tuttle	4.00	CR
LAW 6209	Legislation And Regulation Schaffner	3.00	CR
LAW 6210	Criminal Law Weisburd	3.00	CR
LAW 6214	Constitutional Law I Morrison	3.00	CR
LAW 6217	Fundamentals Of Lawyering II Gullman	3.00	CR
Ehrs	16.00 GPA-Hrs 0.00 GPA 0.000		
CUM	31.00 GPA-Hrs 15.00 GPA 3.467		
Good Standing			

...

DURING THE SPRING 2020 SEMESTER, A GLOBAL PANDEMIC CAUSED BY COVID-19 RESULTED IN SIGNIFICANT ACADEMIC DISRUPTION. ALL LAW SCHOOL COURSES FOR SPRING 2020 SEMESTER WERE GRADED ON A MANDATORY CREDIT/NO-CREDIT BASIS.

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2020			
	Law School		
	Law		
LAW 6250	Corporations Cunningham	4.00	B+
LAW 6400	Administrative Law Siegel	3.00	A-
LAW 6434	Water Pollution Control Downing	2.00	A-
LAW 6641	External Comp - Moot Court Johnson	1.00	CR
LAW 6656	Independent Legal Writing	2.00	A+
LAW 6657	Energy & Environ Law Jrnl Note	1.00	P
LAW 6668	Field Placement	1.00	CR
LAW 6670	Public Interest Lawyering Angel	2.00	B
Ehrs	16.00 GPA-Hrs 13.00 GPA 3.564		
CUM	47.00 GPA-Hrs 28.00 GPA 3.512		
Good Standing			
Spring 2021			
LAW 6230	Evidence Braman	3.00	A
LAW 6238	Remedies Trangsrud	3.00	A
LAW 6380	Constitutional Law II Colby	4.00	A
LAW 6657	Energy & Environ Law Jrnl Note	1.00	P
LAW 6667	Advanced Field Placement Brown	0.00	CR
LAW 6668	Field Placement Tillipman	3.00	CR
Ehrs	14.00 GPA-Hrs 10.00 GPA 4.000		
CUM	61.00 GPA-Hrs 38.00 GPA 3.640		
Good Standing			
THURGOOD MARSHALL SCHOLAR			
TOP 16% - 35% OF THE CLASS TO DATE			

********** CONTINUED ON PAGE 2 **********

Ed Amundson
University Registrar

This transcript processed and delivered by Parchment

THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G33221649
Date of Birth: 02-NOV

Record of: Evan M Brown

Date Issued: 31-MAY-2022

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2021			
LAW 6218	Prof Responsibility & Ethics Berger	2.00	A+
LAW 6240	Litigation W/ Fed Govt. Axelrad	2.00	A
LAW 6360	Criminal Procedure Cheh	3.00	A
LAW 6431	Wildlife And Ecosystems Law Grosko	2.00	A
LAW 6652	Legal Drafting Lynch	2.00	A
LAW 6664	Jrnl Energy/Environmental Law	1.00	CR
LAW 6667	Advanced Field Placement Sulton	0.00	CR
LAW 6668	Field Placement Mccoy	2.00	CR
Ehrs	14.00 GPA-Hrs 11.00 GPA 4.061		
CUM	75.00 GPA-Hrs 49.00 GPA 3.735		
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1%-15% OF THE CLASS TO DATE			
Spring 2022			
LAW 6232	Federal Courts	4.00	A-
LAW 6300	Federal Income Tax	3.00	A
LAW 6442	Control-Solid/Hazardous Waste	2.00	A
LAW 6640	Trial Advocacy	3.00	A+
LAW 6664	Jrnl Energy/Environmental Law	1.00	CR
LAW 6667	Advanced Field Placement	0.00	CR
LAW 6668	Field Placement	2.00	CR
Ehrs	15.00 GPA-Hrs 12.00 GPA 3.972		
CUM	90.00 GPA-Hrs 61.00 GPA 3.781		

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	90.00	61.00	230.67	3.781
OVERALL	90.00	61.00	230.67	3.781

########## END OF DOCUMENT ##########

Ed Smuckler
University Registrar

This transcript processed and delivered by Parchment

May 14, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to provide my enthusiastic recommendation of Evan Brown for a federal judicial clerkship position. In my capacity as a law clerk to Judge Rudolph Contreras of the United States District Court for the District of Columbia, I supervised Evan's work as an intern in Judge Contreras's chambers during the spring of 2022.

I am confident that Evan is qualified to serve as law clerk because, during his semester in Judge Contreras's chambers, he essentially performed the work of a law clerk: he drafted opinions resolving dispositive motions in pending cases. And he did it well. Evan demonstrated strong analytical skills, a quick grasp of complicated legal topics, and an ability to spot potentially important and difficult issues even when the parties had not neatly presented them. When Evan identified such an issue, he always came prepared, research in hand, with a proposed approach. As a result of his proactive analysis and organizational skills, Evan required minimal supervision as he drafted. These skills will only improve over the course of his upcoming clerkship for an Indiana appellate judge.

Writing and analysis skills aside, Evan was proactive and professional throughout his internship. Although our intern program was mostly remote due to COVID, he did a great job of meeting deadlines, keeping supervisors apprised of progress, and quickly responding to communications. He produced quality work product quickly; in addition to drafting two-and-a-half opinions over the course of a semester, he performed thorough cite checks of over 200 pages of opinions drafted by others.

Accordingly, I believe Evan is well qualified to discharge the duties of a law clerk, and I recommend him for such a position without reservation.

Sincerely,

Ben Jernigan

Ben Jernigan - John_Jernigan@dcd.uscourts.gov

U.S. Department of Justice
Civil Division
Tel.: (202) 307-2587
Jimmy.S.McBirney@usdoj.gov

Washington, DC 20530

June 10, 2022

VIA EMAIL

Re: Recommendation for Evan Brown

To Whom It May Concern:

I write in enthusiastic support of Evan Brown, who I had the pleasure of supervising during his time as a summer law clerk with the Department of Justice last summer. Mr. Brown was an exemplary intern who demonstrated an uncommon ability to quickly grasp complex issues and provide valuable insights and work product.

Mr. Brown worked on three major projects with me during his time in our office. On one project, I asked Mr. Brown to conduct research for a potential motion *in limine* to exclude two expert witnesses from testifying at trial in the Court of Federal Claims (COFC). Although there were no published COFC decisions excluding an expert witness under *Daubert,* Mr. Brown quickly identified relevant case law and provided clear and focused reasoning as to how it supported our motion. Mr. Brown's contributions played a major role in our ability to successfully exclude two expert witnesses from presenting their unsound opinions at trial.

Mr. Brown also wrote two excellent memos on other projects involving a motion to conduct a site visit and a niche area of damages. Mr. Brown asked the right questions, and his reasoning was logical, organized, and easy to follow. Mr. Brown was the rare intern who I was able to trust with significant projects that required minimal revision on my part.

Finally, Mr. Brown's work ethic was outstanding. Mr. Brown delivered excellent work product in a short amount of time, and his efficiency provided him opportunities to work on an unusually large number of projects. In addition to working on my cases, Mr. Brown worked on two bid protests with other attorneys in our office, including one in which he drafted substantial portions of a successful motion for judgement on the administrative record. Mr. Brown also worked on a motion to dismiss and a bench memo with other attorneys who also reported high satisfaction with his work product. Accordingly, I have great confidence in Mr. Brown's ability to excel in any clerkship, and in his other future legal endeavors.

Sincerely,

s/ Jimmy S. McBirney

Jimmy S. McBirney
Trial Attorney

The George Washington University Law School
2000 H Street NW
Washington, DC 20052

May 14, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to strongly recommend Evan Brown for a clerkship in your chambers. Evan was a research assistant for me during the summer of 2020 and demonstrated a high level of research and writing skills that stood out from amongst his peers. His work on cost-benefit analysis was exceptionally thorough and thoughtful, and he repeatedly demonstrated the ability to exercise independent initiative and approach research questions in a creative way. Above all, he was dependable in meeting deadlines and producing quality work which is what every judge needs in a clerk.

I have no doubt that Evan would do an exceptional job as a law clerk, and I know this opportunity would equip him with invaluable skills and exposure for launching his legal career. Please call me at (202) 994-4645 or e-mail me at jmanns@law.gwu.edu if you have any questions about Evan.

Sincerely yours,

Jeffrey Manns
Professor of Law
George Washington University

Office of Military Commission
Office of the Prosecution
1600 Defense Pentagon
Room 3B652
Washington, DC 20301

Francis A. Gilligan **Tel: (703) 534 4172**
E-Mail: francis.a.gilligan.civ@mail.mil

June 23, 2022

To Whom It May Concern:

I am writing this letter on behalf of Mr. Evan Brown, who is seeking to be an attorney in your office. Mr. Brown was one of my best students in the Trial Advocacy Course he took from me as part of the J.D. program at The George Washington University Law School. My characterization of Mr. Brown is based in part upon my experience teaching at the J.D. and LL.M. levels and in part on my experience as senior legal advisor to Chief Judge Susan J. Crawford of the U.S. Court of Appeals for the Armed Forces, as chief trial judge for the U.S. Army, and as the chief of the Criminal Law Division and chairman of the Joint Service Committee for the Office of the Judge Advocate General at the Department of the U.S. Army.

In teaching these courses, I use a number of actual cases which require the students to integrate evidence, civil procedure, criminal procedure, ethics, and substantive law as a true test of their ability to order and marshal the facts as an effective advocate. His background and education permitted him to digest arguments pro and con on mant issues in these cases, which no doubt recur in today's court systems. Mr. Brown excelled in analyzing these issues.

Mr. Brown is an excellent thinker, speaker, and writer. I simply cannot imagine a better combination of diverse talent and legal experience to be an attorney in your office.

Sincerely,

Francis A. Gilligan

Francis A. Gilligan

Evan Brown

Writing Sample

This writing sample discusses the issue of "recognized stature" and omits the issue of "work for hire" from the 2019 George Washington University Law School First-Year Student Moot Court Competition. It has only been edited by myself, and I have omitted citations to the record.

STATEMENT OF THE FACTS

Appellant Peach Tree Bank ("Peach Tree") is a bank in Atlanta, Georgia. Appellee Fleur is an environmental activist and artist. On August 1, 2018, Fleur accepted Peach Tree's offer to create artwork ("the work" or "Fleur's work") for display in Peach Tree's branch lobby.

Peach Tree employed Fleur through the work's completion on March 13, 2019. Fleur followed Peach Tree's detailed instructions that the work be a 12-feet tall "triptych" that expresses an environmental theme through text on the side panels and contains imagery in the same style as Fleur's previous works on the middle panel.

Fleur entitled the work *Eco Echo* to connote its environmental message. Fleur's work cannot be moved without damage because Fleur chose to use "delicate" paint that is prone to "chipping."

On November 17, 2018, Fleur was arrested for flying drones in restricted airspace above Heathrow Airport in a demonstration against pollution from the commercial airline industry. In making her point, Fleur created havoc in airports across the United States and Europe and endangered the lives of countless passengers.

Soon after Fleur's demonstration, Fleur's activist-fans began to ratchet up their own environmental demonstrations. In a social media post uploaded two days after Fleur's airport demonstration, a fan "tags" the work next to an image of a semi-truck engulfed in flames and captions the post: "Protect the Earth. At any cost." Less than one month later, hundreds of Fleur's fans assembled around Peach Tree to stage protests that continue to this day. Fleur's fans assault patrons on Peach Tree's premises and create hazardous conditions by blocking exits and crowding the lobby to voice their demands. Peach Tree is not equipped to contain this chaos. Consequently, Peach Tree determined it needed to remove Fleur's work from the lobby. Fleur

fears that removing her work will cause its "delicate" paint to chip and brought this action to enjoin Peach Tree under the Visual Artists Rights Act ("VARA" or "the Act").

Fleur's work has been the subject of critical review across the nation. The reviews skew negative. Dr. David Bloom, the Senior Curator of the Los Angeles Museum of Contemporary Art, describes the work as "ominous" and, aside from the center panel, "basically unremarkable at its core." Rachel Mangus, a local Atlanta art critic, states that the artwork "disappoints" and suggests it has brought Fleur's career "to an end." At the preliminary injunction hearing, Peach Tree's expert, Dr. Alan Rothschild, who holds a Ph.D. in Art History and Critical Art Theory, testified that the work was "garden variety corporate lobby art that in the long run will lose its popular cache and will not be recognized as anything approaching quality art." Even Fleur's expert, Professor Cynthia Katz, agrees that the work lacks critical acclaim; Professor Katz testified that Fleur's work is not one that "the art community recognizes as significant" and could only speculate it might be "one day." Fleur offered only two other examples of praise for the work. One is an advertisement in a Delta airline magazine. The other is an article written by Jayden Freeman, an art curator in Charlotte, North Carolina, who described Fleur's work merely as "destination art . . . design[ed] for banks."

ARGUMENT

The District Court erred in issuing a preliminary injunction because Fleur did not prove the four necessary elements for injunctive relief. A trial court may only issue a preliminary injunction when the moving party proves each of the following:

> (1) substantial likelihood of success on the merits;
> (2) irreparable injury will be suffered unless the injunction issues;
> (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and
> (4) if issued, the injunction would not be adverse to the public interest.

Brooks v. Barrett, No. 2:18-cv-565, 2018 WL 6004682, at *2 (11th Cir. Nov. 15, 2018) (citing *McDonald's Corp. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998)). The court "review[s] the grant of a preliminary injunction under the abuse-of-discretion standard." *F.T.C. v. IAB Marketing Assocs., LP*, 746 F.3d 1228, 1232 (11th Cir. 2014) (citing *CFTC v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1343 (11th Cir. 2008)). "A district court's findings of fact will not be disturbed unless those findings are clearly erroneous." *Id*. (citing *Wilshire Inv. Mgmt.*, 531 F.3d at 1343). "Legal conclusions are reviewed de novo." *Id*. (citing *Wilshire Inv. Mgmt.*, 531 F.3d at 1343).

First, Fleur did not prove a substantial likelihood of success on the merits because the work's lack of critical acclaim puts it outside of VARA's ambit. *Second*, Fleur did not prove an irreparable injury because damage to the work is compensable in damages. *Third*, Fleur did not prove her alleged injury outweighs harm to Peach Tree because an injunction would expose Peach Tree to liability for injuries on its property and impair its business. *Finally*, granting the injunction would run against the public interest because the continued presence of the artwork endangers the public.

I. Fleur did not prove a likelihood of success on the merits because the work is not covered by VARA

Fleur's work is not covered by VARA because VARA only protects artwork "of recognized stature." 17 U.S.C. § 106A(a)(3)(B). This case presents an issue of first impression before this Court. Nonetheless, holdings from the other courts presented with this issue and the plain language of VARA itself unequivocally demonstrate that Fleur's work lacks recognized stature. Therefore, Fleur cannot show a likelihood of success on the merits.

At minimum, artwork must generally be viewed as high-quality by experts to have recognized stature. *See Carter v. Helmsley-Spear*, 861 F. Supp. 303 (S.D.N.Y. 1994), *rev'd on*

other grounds, 71 F.3d 77 (2nd Cir. 1995). In the most cited case among VARA decisions, the court in *Carter* declared that artwork must be "viewed as meritorious" by "art experts, other members of the artistic community, or some cross-section of society" to have recognized stature. *Id.* at 325–26 (artwork had recognized stature when multiple experts praised its coherence, uniqueness, and conceptual imagination). The Seventh Circuit adopted the *Carter* test in *Martin v. City of Indianapolis*, where it found a steel sculpture had recognized stature based on local magazine articles, a letter from a local gallery director, and a letter to the editor of the local newspaper, all of which praised the sculpture. 192 F.3d 608, 612 (7th Cir. 1999).

Without expert support, popularity alone cannot establish that a work has recognized stature. *See Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2nd Cir. 2020). In finding popular aerosols were covered by VARA, the Second Circuit in *Castillo* did not end its analysis with the work's popularity, but rather endorsed the *Carter* test in declaring, "[t]he most important component of stature will generally be artistic quality." *Id*. at 166, 170. The court then reviewed expert testimony that established that the aerosols "reflect[ed] striking technical and artistic mastery." *Id.* at 170.

Peach Tree's position that VARA requires convincing expert testimony to establish that the artwork has recognized stature respects VARA's textual limitations. Courts should reject standards that speculate on the work's *potential* to achieve recognized stature because the text of VARA requires that the work's recognized stature exist today; protected works must be "*of* recognized stature." 17 U.S.C. § 106A(a)(3)(B) (emphasis added).

Peach Tree's position also appropriately balances VARA's purpose of preserving artwork with legitimate property interests. Congress went "to extreme lengths to very narrowly define the works of art that [are] covered." H.R. Rep No. 101-514, at 6921 (1990). By setting the

standard too low, "courts risk alienating those . . . whose legitimate property interests are curtailed." Christopher J. Robinson, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 Fordham L. Rev 1935, 1968 (2000). The court in *Carter* observed this risk when it referred to recognized stature as a "gate-keeping mechanism." 861 F. Supp. at 325. Fleur's reading that VARA protects artworks with merely the *potential* to achieve recognized stature would render art owners "the perpetual curator of a piece of visual art that has lost (or perhaps never had) its luster." *Martin*, 192 F.3d at 616 (Manion, J. dissenting in part).

Fleur's work lacks recognized stature because art authorities do not generally view it as high-quality work. The *Castillo* court found aerosols had recognized stature based on expert testimony that the artwork "reflect[ed] striking technical and artistic mastery." 950 F.3d at 166. Unlike the artwork in *Castillo*, the art community generally finds Fleur's work to be of unexceptional quality. Dr. Rothschild testified that Fleur's work was "garden variety." Dr. Bloom criticized Fleur's work as "basically unremarkable at its core." Although Fleur's expert personally enjoys Fleur's work, she admitted the work is not currently one that "the art community recognizes as significant." But that is exactly what the words "of recognized stature" require. 17 U.S.C. § 106A(a)(3)(B).

The only positive reviews in the record do not come close to counterbalancing the negative. The Delta magazine only uses Fleur's work as a selling point to entice readers to "take advantage of Delta's great fares to Atlanta" and is far from an art authority. Mr. Freeman's article, meanwhile, cabins Fleur's work as "destination art . . . design[ed] for banks." For a curator of art, this is a far cry from high praise. Moreover, Mr. Freeman's article says nothing about the work's artistic merit.

Even under the least rigorous version of the *Carter* test, Fleur's work would not qualify. Whereas the absence of expert testimony in *Martin* was counterbalanced by uniform praise in publications and letters, including those written by art authorities, 192 F.3d at 612, Fleur's work's reviews skew negative. The scant instances of praise for Fleur's work come nowhere close to the overwhelming praise found in *Martin*. Fleur's work, thus, lacks recognized stature.

The District Court erred in finding that the work's popularity amongst Fleur's own fans reflects the artistic quality necessary for VARA protection because, as described above, the art community generally finds Fleur's work unremarkable. Fleur's fan base cannot count as a "cross-section" of society under the *Carter* test. If that were the case, the *Castillo* court that reviewed popular aerosols would have had no need to consult the opinion of experts——the aerosols' fanbase would have been sufficient. Moreover, there is little evidence that Fleur's fans find the work "meritorious" for anything more than its underlying environmental message. *Cf. Carter*, 861 F. Supp. at 325–26 (artwork must "be viewed as meritorious"). The social media post from one of Fleur's fans in the record—the only evidence of the views of Fleur's fan base—is silent on the work's quality. Fleur's fans have assembled around the work not to admire its artistic merit, but to protest its corporate owner. In reality, Fleur's work has only received widespread attention because of its popular environmental message.

It goes too far to protect works like Fleur's that, although they express a popular message, might only "one day" be recognized as significant for their artistic merit. VARA requires that protected works be "*of* recognized stature" not be of *potential* recognized stature. 17 U.S.C. § 106A(a)(3)(B) (emphasis added). To protect works based on their potential would unduly suspend property owners like Peach Tree in uncertainty regarding rights to their own

artwork; would discourage collecting, commissioning, and sponsoring the very art VARA seeks to protect; and would go far beyond VARA's textual limitations.

To be protected under VARA, artwork must presently have recognized stature. Fleur's work does not. Therefore, the work is not protected by VARA, and Fleur cannot demonstrate a likelihood of success on the merits. The trial court, therefore, erred in granting a preliminary injunction.

* * * * *

Applicant Details

First Name	**Ebba**
Last Name	**Brunnstrom**
Citizenship Status	**U. S. Citizen**
Email Address	**ebbaslb@gmail.com**
Address	**Address** Street **PO Box 210** City **Roxbury** State/Territory **Connecticut** Zip **06783** Country **United States**
Contact Phone Number	**4014898281**

Applicant Education

BA/BS From	**Brown University**
Date of BA/BS	**May 2019**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Human Rights Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Sturm, Susan
ssturm@law.columbia.edu
212-854-0062
Richman, Dan
drichm@law.columbia.edu
212-854-9370
Pozen, David
dpozen@law.columbia.edu
2128540438

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ebba Shinjin Lee Brunnstrom
508 West 112th Street, 7C
New York, NY 10027
(401) 489-8281

June 12, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker,

I am a rising third-year student at Columbia Law School. I write to apply for a clerkship in your chambers beginning in 2024.

My two years of experience working as a paralegal in the Criminal Division of the U.S. Attorney's Office in New York make the prospect of starting my legal career clerking in your chambers particularly appealing. I really value your experience as an AUSA. I would also be thrilled to return to work in the D.C. area, where I have lived for two summer internships.

Enclosed please find a resume, transcript, and writing sample. Also enclosed are letters of recommendation from Professors Richman (212-854-9370, drichm@law.columbia.edu); Pozen (212-854-0438, dpozen@law.columbia.edu), and Sturm (212-854-0062, ssturm@law.columbia.edu). Professor Seo (212-854-4779, sarah.seo@law.columbia.edu) has also agreed to act as an additional reference for me.

Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Respectfully,

Ebba Shinjin Lee Brunnstrom

EBBA BRUNNSTROM
508 West 112th Street, 7C, New York, NY 10025
esb2166@columbia.edu • (401) 489-8281

EDUCATION

COLUMBIA LAW SCHOOL, New York, NY
J.D. expected May 2024
Honors: Butler Fellow (merit scholarship)
Harlan Fiske Stone Scholar 1L Year, James Kent Scholar 2L Year

Activities: *Columbia Human Rights Law Review*, Notes Editor, 2L Staffer
Research Assistant to Professor David Pozen, 2022
Teaching Fellow to Professor Phillip Bobbitt, Legal Methods 2022 and 2023
Teaching Fellow to Professor Susan Sturm (Civil Procedure), Fall 2022
Teaching Fellow to Professor Sarah Seo (Criminal Law), Spring 2023
Criminal Justice Action Network, Pro Bono and Advocacy Chair

BROWN UNIVERSITY, Providence, RI
B.A., *magna cum laude* and with Honors, in Philosophy, received May 2019
Thesis: *"Time and Truth: Relative Truth-Assessment for the Growing Block Theory of Time"*
Activities: NCAA D1 Varsity Women's Fencing Team, Captain and Starting Member
The Blognonian, Editor-in-Chief and Staff Writer
Introduction to Astronomy, Physics Department Undergraduate Teaching Assistant
The Brown Journal of Philosophy, Politics and Economics, Philosophy Section Editor

EXPERIENCE

SULLIVAN & CROMWELL, New York, NY
Summer Associate May 2023 – July 2023

DEPARTMENT OF JUSTICE, CRIMINAL APPELLATE SECTION, Washington, D.C.
Legal Intern May 2022 – July 2022
Researched and wrote four memoranda to the Solicitor General concerning whether she should approve an appeal, rehearing, or certiorari in criminal cases where there was a ruling adverse to the United States. Helped Appellate Section Attorneys research issues for briefs, certiorari petitions and current issues facing the department. Drafted facts and argument section of a brief to be submitted to the Sixth Circuit Court of Appeals.

U.S. ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK, New York, NY
Paralegal Specialist, Criminal Division July 2019 – August 2021
Managed federal criminal cases from the investigation to the trial stage, working directly with Assistant U.S. Attorneys in the Narcotics Unit. Assisted in drafting legal documents including subpoenas, motions, and discovery letters. Presented exhibits in federal trial court.
Summer Undergraduate Intern – Press Office June 2018 – August 2018
Assisted in composing press releases and quotes. Performed paralegal duties for the Public Corruption Unit. Received competitive Brown University LINK Award for summer internships.

PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, Washington, D.C.
Criminal Law Internship Program – Investigative Intern June 2017 – August 2017
Worked on highest-level felony cases, including two homicides, as a member of a four-person team.

TELEGRAPH MEDIA GROUP, THE TELEGRAPH NEWSPAPER, London, UK
News Desk Intern June 2016 – August 2016
Published seven general news articles in the internationally renowned newspaper *The Telegraph*.

Columbia Law School

Registration Services

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CLS TRANSCRIPT (Unofficial)

06/07/2023 10:06:05

Program: Juris Doctor

Ebba Brunnstrom

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6407-1	Advanced Constitutional Law: 1st Amendment	Healy, Thomas Joseph	3.0	A-
L6109-1	Criminal Investigations	Livingston, Debra A.	3.0	B+
L6425-1	Federal Courts	Funk, Kellen Richard	4.0	A-
L6683-1	Supervised Research Paper	Sanger, Carol	2.0	A
L6822-1	Teaching Fellows	Seo, Sarah A.	3.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Richman, Daniel	3.0	A-
L6241-1	Evidence	Shechtman, Paul	3.0	A
L6675-1	Major Writing Credit	Sanger, Carol	0.0	CR
L8951-1	S. Cybersecurity, Data Privacy and Surveillance Law [Minor Writing Credit - Earned]	Richman, Daniel; Tannenbaum, Andrew; Waxman, Matthew C.	2.0	A
L6685-1	Serv-Unpaid Faculty Research Assistant	Pozen, David	2.0	A
L6683-1	Supervised Research Paper	Sanger, Carol	1.0	A-
L6822-1	Teaching Fellows	Bobbitt, Philip C.	1.0	CR
L6822-2	Teaching Fellows	Sturm, Susan P.	4.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-2	Criminal Law	Seo, Sarah A.	3.0	A-
L6679-1	Foundation Year Moot Court		0.0	CR
L6121-30	Legal Practice Workshop II	Yen, Marianne	1.0	HP
L6116-2	Property	Purdy, Jedediah S.	4.0	A-
L6183-1	The United States and the International Legal System	Waxman, Matthew C.	3.0	A-
L6118-1	Torts	Huang, Bert	4.0	A-

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-8	Legal Methods II: Impeachment	Bobbitt, Philip C.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-4	Civil Procedure	Sturm, Susan P.	4.0	A
L6133-6	Constitutional Law	Pozen, David	4.0	B+
L6105-8	Contracts	Kraus, Jody	4.0	A-
L6113-3	Legal Methods	Harcourt, Bernard E.	1.0	CR
L6115-30	Legal Practice Workshop I	Izumo, Alice; Yen, Marianne	2.0	P

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 62.0

Total Earned JD Program Points: 62.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	James Kent Scholar	2L
2021-22	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	40.0

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Ebba Brunnstrom for a position as your law clerk. Ebba was a student in my Civil Procedure class in the Fall of 2021, and then served as a teaching assistant for Civil Procedure the following year. Ebba's strengths as a rigorous thinker, resourceful researcher, and excellent writer, along with her initiative and follow-through.
I was aware of Ebba's mastery of the material based on her excellent performance whenever called upon to discuss a case in class. Her responses demonstrated that she was consistently well prepared, that she understood the cases, and had an extremely logical mind that enabled her to make sense of complexity without oversimplifying. Seeing her quiet strength, I was excited when Ebba received an A on the civil procedure final exam. She was also highly recommended by her teaching assistant to become a teaching assistant the following Fall.

When I offered the position to Ebba, I had my first genuine opportunity to interact in a more sustained way with her. I saw her powerful mind at work, alongside the humility and willingness to learn that I would come to expect from Ebba. We had a rare conversation in which Ebba really probed what being a successful teaching assistant entailed and what made me believe that she was qualified for that position. We talked through specific examples from her exam and her in-class performance, connecting the capabilities they demonstrated to the role that Ebba would have a chance to play as a TA. Only after she saw that she had demonstrated the skills needed to serve as a TA at a high level of performance did Ebba accept the position.

Ebba's performance as a TA was terrific, right from the beginning. She took the initiative to reach out to students from the class to get their perspectives on what worked well in sections and what could be improved. She also gathered the materials used by TAs in the previous year, along with helpful visual and analytical presentations by classmates, so that they could inform the design of sessions for the coming year. Her feedback about my classroom presentations, an important part of the job, was consistently astute, thoughtful, and concretely useful. They revealed her insight, her willingness to speak her mind, and the humility and empathy that made her so effective in communicating both affirmation and constructive criticism. She provided similar kinds of feedback to the other TAs, becoming a valued partner in revising the weekly problems and providing thoughtful comments on their pedagogical choices. She also pulled together a set of slides for the TA sections on personal jurisdiction and joinder, building on prior presentations. The slides were so strong that we decided to use them in each of the TA sections. The combination of Ebba's humility, organizational skill, and rigor was evident in these presentations, as well as in the problems that she developed for use in section. She was able to reconstruct her learning process, remembering how someone unfamiliar, for example, with personal jurisdiction doctrine might go wrong in their analysis, and then to offer modes of presenting the material that would help other people's mastery.

Ebba thrives on intense preparation, opportunities for a mental challenge, and strong working relationships, all of which were on display in her role as a TA. She shared those skills generously with her section, providing unwavering support for her students and consistently insightful and comprehensive feedback on their written work. At the end of the semester, she became my thought partner in brainstorming ideas for the final exam, providing straightforward and extremely insightful responses that were invaluable in helping me develop a challenging but fair exam.

Ebba has come to her passion for law through the portal first of science and math, discovering that her logical mind drew her to philosophy, and her thirst for social justice and real world impact led her to connect that philosophical bent to law. She is genuinely interested in forging a legal career that enables her to make the greatest possible impact, be part of a team, and work in an environment where justice matters. She also would love to be able to apply her research and writing skills, and to see judicial decision making up close. Her interest in clerking flows from this combination of capabilities and interests.

Finally, Ebba is wonderful to work with—kind, empathetic, humble, generous, and reliable. I have no doubt that she will make an excellent law clerk, and I highly recommend her.

Sincerely,

Susan Sturm

Susan Sturm - ssturm@law.columbia.edu - 212-854-0062

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Ebba Brunnstrom

Dear Judge Walker:

I write to enthusiastically support the application of Ebba Brunnstrom, a Columbia Law School rising 3L (Class of 2024), to be your law clerk. Although her grades, though quite good, are a little short of stratospheric, I think – based on my extensive interaction with Ebba and her writing projects – that she is one of the top candidates in her class. She really is spectacular.

Although I don't teach 1L courses, I met Ebba at the start of her 1L year. Because of her strong commitment to public interest work – reflected in her year as an intern homicide investigator for the DC Public Defender Service and her three years as a paralegal in the Criminal Division of the SDNY USAO -- she had been selected as a Public Interest/Public Service Fellow, and I was lucky enough to be assigned to be her mentor. We had some great conversations about course selection and her career plans, and I was deeply struck by her no-nonsense manner and deep intelligence.

I got to know Ebba's work far better in her 2L year, when she took my Criminal Adjudication course and the seminar on Cybersecurity, Data Privacy, and Surveillance Law that I teach with my colleagues Matt Waxman and Andrew Tannenbaum. In addition, although I am not Ebba's formal advisor for the Note she was writing for the Columbia Human Rights Law Review on the extent to which the Comstock Laws – creating federal offenses for the distribution of materials "designed, adapted, or intended for producing abortion" – could be used to prosecute (or to sue under civil RICO) in the wake of Dobbs v. Jackson Women's Health Organization (2022), I am playing a substantial back-up role.

Ebba was a flat-out outstanding participant in the cyber seminar. Perhaps because of her work on both sides of criminal cases, she brought a lovely sense of balance to the sundry issues we explored – digital evidence collection; the regulation of spyware, and cybersecurity liability, to name a few – combined with an analytic acuity and careful expression that gave her classroom contributions particular weight.

Ebba also wrote an extraordinary final paper on a topic that highlighted her enormous intellectual range. In late 2022, Apple pulled back from its plan to use on-device hash-value matching to scan a user's iCloud account for known child sexual abuse material (CSAM) images. Notwithstanding the criticism from privacy advocates, Ebba explained how Apple's proposed method of scanning for CSAM, would have survived Fourth Amendment scrutiny as a voluntary private search, even where Apple sent scanned files to the National Center for Missing & Exploited Children's Cyber Tipline, for use in possible prosecutions. The new complication, Ebba showed, was that legislation proposed by the European Commission in late 2022 would oblige Apple to do the very scanning it had decided not to do. This raised the question whether scanning that Apple would now be legally required to do, albeit by a foreign government, could be considered "private" for Fourth Amendment purposes. Ebba really got to show her stuff in this piece: fully engaging with the technical details of hash-value scanning; the institutional structure of CSAM enforcement in the US; the "joint coercion" and other Fourth Amendment doctrines, and the interaction of EU and US law. This is someone with a taste for really complex legal problems, and a talent for carefully teasing out the component parts and showing their analytical interaction.

Ebba's intellectual range and ability to dive into, and quickly master, a complex and dynamic legal environment was further displayed in her Note. Long before most of her classmates had even started to think about their Note topics, Ebba decided – based, in part on her work in the Criminal Appellate Section at Main Justice over the summer, and way before just about any scholar had focused on the issue – to determine the current status of the Comstock Laws in the wake of Dobbs. Ebba worked though the legislative history and sparse caselaw relating to these statutes, and, long before the Office of Legal Counsel had tackled the issue, had teased out a doctrinally legible understanding of how these massively underspecified prohibitions worked in a landscape of state law variation. The OLC memo has hardly preempted Ebba, as she has gone on to make a powerful void-for-vagueness argument that is an important contribution to current debates.

Ebba's massive intellectual range is matched by her writing ability. She writes fluidly and extremely clearly, without fanfare and to powerful effect. She also responds with grace and speed to criticism. I've long thought that journalism experience is great preparation for clerking (and law school for that matter), since the ability to compose clearly under pressure is such an asset. So I wasn't surprised to see that Ebba spent a summer, just out of high school, writing articles for The Telegraph (UK) newspaper.

Ebba's range is not limited to law. She came into Brown as an astrophysics major, having been a runner-up in the UK Young Scientist of the Year competition when she went to school there. Although she soon shifted to philosophy, and caught the law-school bug, she remains interested in the intersection of law and science. And, though she never mentioned it to me, I think Ebba's star turn as captain and starting member of the Brown fencing team shows precisely the discipline and commitment that I

see in her law school work.

Ebba strikes me as a well-grounded, mature person, of extraordinary competence. She also seems like she'd be a pleasure to have in chambers – low-key and straightforward, with a terrific sense of humor. I am confident she would be an excellent law clerk. If there is anything else I can add, please give me a call.

Respectfully yours,

Daniel Richman

Dan Richman - drichm@law.columbia.edu - 212-854-9370

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Ebba Brunnstrom

Dear Judge Walker:

It is my pleasure to recommend Columbia Law School rising 3L Ebba Brunnstrom for a clerkship in your chambers. Ebba is one of the stars of the class of 2024 and will be a fantastic clerk.

I first met Ebba, who was lured away from other law schools by a merit scholarship, when she was one of 40 students assigned to my Constitutional Law "small group" in the fall of 2021. It was clear that Ebba was immaculately prepared for every class, and each time I called on her, she gave a crisp and insightful response. But she didn't volunteer very much, so when her final exam fell just short of an A-, I thought it was unfortunate but didn't bump the grade up (and another student's grade down), instead resolving to keep an eye out for a student on the shy side who had great promise.

Thankfully, Ebba soon followed up with me to learn more about a book-in-progress I had mentioned during class, on the constitutional history of the war on drugs. Ebba had been a paralegal in the U.S. Attorney's Office for the Southern District of New York before law school, as well as an intern in the D.C. Public Defender's Office during college, and she has a strong interest in criminal law. During that first conversation on the book, Ebba asked such probing questions about Eighth Amendment challenges to drug sentences that I took the rare step of offering her a Research Assistant position while she was still a 1L. Ebba accepted, and starting that spring and continuing into this past academic year, she has been one of my main RAs.

Ebba has been superb in this role. I have given her a diverse array of assignments, from tracing the evolution of the American Bar Association's stance on drug policy over time, to reconstructing political responses to the revelation that Supreme Court nominee Douglas Ginsburg had smoked pot while a law professor, to tracking down amicus briefs submitted to state supreme courts in drug cases from the 1970s, to finding every law review article and judicial opinion since 1960 that has advanced any version of a Cruel and Unusual Punishment Clause argument against long sentences for nonviolent drug offenses. On all of these assignments, Ebba has been a rock—dependable, thorough, timely, accurate. She has been the model of a hyper-diligent, hyper-competent RA.

Ironically, it was in my Constitutional Law class that Ebba had her least successful experience at Columbia, as she has received A-range grades otherwise and starred in numerous settings. Indeed, Ebba has developed such a strong reputation for professionalism and dependability that no fewer than three professors have employed her as a Teaching Fellow—something that is almost unheard of here. Ebba has been a leader of the student group devoted to criminal justice issues. And she has written an impressive note, scheduled for publication next year, that offers a new take on the much-discussed issue of whether the mailing of abortion drugs is prohibited by the Comstock Act. Against the position of both Republican state attorneys general and the Biden administration's Office of Legal Counsel, Ebba argues that the Comstock Act is void for vagueness.

If Ebba initially struck me as shy, I now see her as a quiet but confident force of nature. Having lived abroad for much of her life and worked in a variety of criminal justice jobs, it takes a lot to faze Ebba. Her tenacity and work ethic were strengthened further by being a Division 1 fencer in college (for the details, see https://brownbears.com/sports/fencing/roster/ebba-brunnstrom/9256). And as her successes in multiple Teaching Fellow positions reflect, Ebba has become not just a widely respected figure but a widely recognized leader of the student body. Perhaps owing to her background in philosophy and science—Ebba was a runner-up for the UK Young Scientist of the Year award while in high school in London and majored in philosophy at Brown—she just takes care to be precise and informed when she speaks.

In short, Ebba is a person of great substance, smarts, and ability. She has distinguished herself in criminal law subjects more than any other student in the class. Her work ethic is exemplary. And she has proven to me time and again that her legal research skills are first-rate. I have no reservations about Ebba, only admiration, and I have no doubt that she will continue to do first-rate work as a clerk. Any judge would be lucky to hire her.

If I can be of any further assistance, please do not hesitate to contact me.

Respectfully,

David Pozen

David Pozen - dpozen@law.columbia.edu - 2128540438

Columbia Law School J.D. '24
401-489-8281
esb2166@columbia.edu

CLERKSHIP APPLICATION WRITING SAMPLE

This writing sample is an excerpt of the last two sections of my Note, 'Abortion and the Mails: Challenging the Applicability of the Comstock Act Laws Post-Dobbs.' This Note was advised by Professor Carol Sanger. I also received some high-level feedback from Professor Dan Richman and a student editor from the *Columbia Human Rights Law Review*. This Note has been selected for publication in the *Columbia Human Rights Law Review* in fall 2023.

The Comstock Act Laws prohibit the mailing and importation of any abortion-related material within the United States. Whatever protection there was against the application of these laws by the government and private individuals from the constitutional right to an abortion was overturned by Dobbs v. Jackson Women's Health Organization, 597 U.S. __ (2022). Recent trends from the last year show that Republican lawmakers are eager to start enforcing the Comstock Act mailing prohibitions. Pushback from this administration's Office of Legal Counsel (the "OLC") suggests that a limiting construction should be read into the Comstock Act Laws so that the prohibition on mailing would apply only to "illegal abortions." The first two sections of this Note give an overview of the caselaw, legislative history, and long period of non-enforcement surrounding these statutes. In these latter two sections, the Note engages with criticism of the OLC's interpretation and ultimately concludes that the Comstock Act Laws are unconstitutionally vague.

III. DEFINING AN 'ILLEGAL ABORTION'

Although the word "illegal" does not appear in the text of the statutes, the case law on 18 U.S.C. §§ 1461 and 1462[1] requires that the government prove the defendant had the intent that the articles they sent in the mail be used unlawfully—in other words, for an "illegal abortion."[2] This limiting construction has been uniformly applied by federal courts in the limited number of cases that were brought under the provision of the statute that prohibited the mailing of contraception-related articles.[3] It was even accepted by the USPS and brought to the attention of Congress.[4]

Whether the definition of an "illegal abortion" under this construction should take on a meaning local to the state in which the sender directs the mail—as suggested by the OLC in a December 2022 Opinion—is another matter. In this Section, this Note explores arguments for and against adopting this "local" narrowing construction of the Comstock Act laws.

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[1] 18 U.S.C. § 1461, Mailing Obscene or Crime-Inciting Matter; 18 U.S.C. § 1462, Importation or Transportation of Obscene Matters. Originating in the Comstock Act, Comstock Act, ch. 258, 17 Stat. 598 (1873) ("An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use").

[2] The OLC determined that 18 U.S.C. § 1461 does not prohibit the mailing, delivery or receipt by mail of mifepristone and misoprostol where the sender "lacks the intent that the recipient of the drugs will use them unlawfully." Their conclusion is predicated on the determination that federal judges interpreting § 1461 read a reasonability exception into the law. Therefore, the applicability of the Comstock Act laws is limited to cases where the government can show that the defendant had the intent that the articles be used "for *illegal* contraception or abortion." Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions, 46 Op. O.L.C. ___ (Dec. 23, 2022) https://www.justice.gov/olc/opinion/file/1560596/download [hereinafter *OLC Opinion*].

[3] Youngs Rubber Corp. v. C.I. Lee & Co., 45 F.2d 103 (2d Cir. 1930); Davis v. United States, 62 F.2d 473 (6th Cir. 1933); United States v. Nicholas, 97 F.2d 510 (2d Cir. 1938). *See* Part 1(C). for a discussion of the relevant case law and note 79 for an overview of the consensus of the limiting construction as applied to the contraception-related provision of the Comstock Act laws.

[4] *OLC Opinion supra* note 9 at 17-20.

A. In Defense of the OLC's Local Construction

The OLC adopts what this Note will call the "local" interpretation of the Comstock Law. Under the local construction, the intent to produce an "unlawful" abortion cannot be inferred from delivery of abortion pills into a state with restrictive abortion laws, since the pills likely have some lawful uses under state-specific law. So, the OLC concludes that the criminal intent of the seller should be evaluated in relation to the specific abortion law in place in the state in which the non-mailable material is sent.

This position is most defensible if one sees *Youngs Rubber Co.* as instructive in interpreting § 1461. In *Youngs Rubber Co.*, the court looked to local laws to conclude that the contraceptives at issue were mailed for a legitimate use. The court stated that since "[t]here is no federal statute forbidding the manufacture or sale of contraceptives[, t]he articles which the plaintiff sells may be used for either legal or illegal purposes." In particular, the *Youngs Rubber Co.* panel pointed to preventing disease and preventing conception in instances "where that is not forbidden by local law" as examples of legitimate uses of the contraceptives.[5] The court went on to conclude: "By the local law of New York, such articles are not absolutely prohibited. Section 1145 of the Penal Law authorizes the supplying of them to lawfully practicing physicians, or by their direction."[6]

The approach adopted by *Youngs Rubber Co* and the OLC suggests that unless a state outright banned the use of abortion medication for any purposes, unlawful intent could not be inferred. This reading would mean federal law would be applied differently from state to state. However, that would not be that unusual. For example, the current federal gambling regime

[5] *Youngs Rubber Corp.* 45 F.2d at 107 (describing "promot[ing] illicit sexual intercourse" as an example of contraceptive use that would be forbidden by local law).
[6] *Id.* at 107.

penalizes "illegal" gambling businesses, where the definition of "illegal" depends on state laws that vary from state to state.[7]

Rev. Stat. §§ 3893 and 3894, the codification of the Comstock Act in 1873,[8] originally provided penalties for mailing obscene books (and articles or things designed for the prevention of conception or the procuring of abortion) and prohibited letters and circulars concerning *illegal* lotteries from passing through the mails.[9] The original form of the law was understood to allow for the mailing of legal lotteries, meaning that it did not bar states with legal lotteries from mailing lottery circulars within that state.[10] This shows that when the word "illegal" appeared in a federal statute relating to the mailing of lotteries, the general consensus was to adopt a state law-specific construction of the word. This is strongly supported by a House Report of the Subcommittee on Criminal Justice from 1978, which proposed modifying § 1461 to require "proof that the offender aided in the mailing of a means of procuring an illegal abortion,"

[7] *See e.g.* 18 U.S.C. § 1955, Prohibition of illegal gambling businesses (stating that "[a]s used in this section 'illegal gambling business' means a gambling business which… is a violation of the law of a State or political subdivision in which it is conducted…."). *See also* 18 U.S.C. § 1952, The Interstate and Foreign Travel or Transportation in Aid of Racketeering Act (making it unlawful to "[travel] in interstate or foreign commerce or [use] the mail or any facility in interstate or foreign commerce, with intent to . . . distribute the proceeds of any unlawful activity" where an "unlawful activity" under the Act is defined as "any business enterprise involving gambling . . . in violation of the laws of the state in which [the unlawful acts] are committed.").

[8] *See* Peter H. Flournoy & J. B. O'Donnell, *Private Correspondence and Federal Obscenity Prosecutions*, 4 SAN DIEGO L. REV. 76, 88 (1967).

[9] 19 Stat. 90, Chap. 186, Prohibition on Mailing Obscene Materials and Lottery-Circulars, Rev. Stat. §§ 3893 and 3894 (emphasis added).

[10] *See* Lottery Circulars, 15 U.S. Op. Atty. Gen. 203 (1877) (stating that "[l]egal lotteries are those established by law, like the Louisiana State Lottery, or the one authorized by the original charter of Washington"); *see also* "in States like Louisiana, Kentucky, Alabama, or Georgia, and Virginia, where I think they are permitted to draw lotteries of some character, it would be highly improper, in my judgment, to allow the postmasters to prevent the circulation of lottery circulars while those States allow lotteries. The provision of the law as it now stands operates upon "illegal lotteries" only, upon lotteries that are unauthorized by law." Cong. Rec. S. 4264 (June 30, 1876) (Mr. Wythe discussing the bill H.R. No. 2575 to amend sections 3893 and 3894 of the Revised Statutes).

explaining that "[u]nder this provision an abortion is 'illegal' if it is contrary to the laws of the State in which the abortion is performed."[11]

Similarly, when the Supreme Court upheld a federal statute prohibiting the broadcast of lottery advertising by any broadcaster located in a state that banned lotteries, they recognized that they could "accommodate the operation of legally authorized state-run lotteries consistent with continued federal protection to nonlottery States' policies."[12] Surely a similar compromise could be made with respect to the mailing of abortion-related material in abortion and non-abortion states.

B. Against a Local Construction of "Illegal"

There are at least three reasons to question the OLC's interpretation of the Comstock Act. First, *Youngs Rubber Co.* is not controlling. This may be what conservative commentator Ed Whelan meant when he criticized the OLC's opinion by claiming that the cases they cited did not actually support their position.[13] Whelan contends that the Seventh Circuit case *Bours v. United States* actually undermines the notion that state law is relevant in the application of § 1461. There might be a good reason to think that the *Bours* opinion is more relevant to abortion

[11] H.R. REP. No. 95-29 at 39-40 (1978), from the Subcommittee on Criminal Justice at 39-40 (1978).
[12] United States v. Edge Broad. Co., 509 U.S. 418, 418 (1993). *See also* Richard H. Fallon Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L. J. 611, 641 n. 118 (2007) (using *Edge Broadcasting Co.* and the existence of varying First Amendment rights under obscenity from state to state to argue that disparity created by a state that forbid abortion potentially prohibiting abortion advertising within that state and other states where such advertising would remain constitutionally protected would not be "wholly unprecedented").
[13] Ed Whelan, *Unreliable OLC Opinion on Mailing of Abortion Drugs—Part 1*, NAT'L REV. (Jan. 4, 2023) https://www.nationalreview.com/bench-memos/unreliable-olc-opinion-on-mailing-of-abortion-drugs/; Ed Whelan, *Unreliable OLC Opinion on Mailing of Abortion Drugs—Part 2*, NAT'L REV. (Jan. 5, 2023) https://www.nationalreview.com/bench-memos/unreliable-olc-opinion-on-mailing-of-abortion-drugs-part-2/; Ed Whelan, *Unreliable OLC Opinion on Mailing of Abortion Drugs—Part 3*, NAT'L REV. (Jan. 6, 2023) https://www.nationalreview.com/bench-memos/unreliable-olc-opinion-on-mailing-of-abortion-drugs-part-3/.

cases—of all the Circuit Court cases dealing with § 1461, *Bours* is the only one that specifically related to the abortion provision of the statute.[14] The other courts apply the holding and reasoning of *Bours* to the contraception provision. Therefore, it might be somewhat circular to justify an expanded reading of the abortion provision with the other contraception cases, rather than looking to *Bours* itself.

Although *Bours* argued for a rule of reasonable construction, the court stated that when applying the federal law to "an alleged offensive use of the mails at a named place, it is immaterial what the local statutory definition of abortion is."[15] Rather than looking to which acts of abortion are included or excluded by the local statute, the *Bours* court stated that "the word 'abortion' in the national statute must be taken in its general medical sense."[16] So, those acts of abortion that are not covered excludes only "those acts that are in the interest of the national life."[17] This appears to reject the local construction. The repeated references to a "national" interest for a "national statute" seem to imply that enforcers of the statute should instead find some national definition of an illegal abortion and apply that to the law.[18]

The Second Circuit in *One Package* seems to suggest something similar when they state that they assume the law at issue "exempts only such articles as the act of 1873 excepted," but are satisfied that the Comstock laws "embraced only such articles as Congress would have denounced as immoral if it had understood all the conditions under which they were to be

[14] United States v. One Package, 86 F.2d 737 (2d Cir. 1936) deals with a prosecution for the mailing of contraception-related articles or things (vaginal pessaries). The prohibition on mailing things or writings related to contraception was subsequently amended out of the law, which is discussed further in earlier sections of this Note.
[15] Bours v. United States, 229 F. 960, 964 (7th Cir. 1915).
[16] *Id.*
[17] *Id.*
[18] *Id.*

used."[19] By referring to a singular Congressional intent, the court implies that there was one class of uses Congress took to be prohibited by the law, and another that Congress would have allowed. The court does not make any reference to state-by-state standards within this understanding.

Second, even the legislative history cuts against the OLC's broader position. Congress' decision not to amend the text of the law to include the word "illegal" before "abortion" could be seen as an implicit ratification of the judicial construction, or a stubborn adherence to the original text of the statute. In 1978, a House Report of the Subcommittee on Criminal Justice proposed modifying § 1461 to require "proof that the offender aided in the mailing of a means of procuring an illegal abortion," explaining that "[u]nder this provision an abortion is 'illegal' if it is contrary to the laws of the State in which the abortion is performed."[20] Although this report demonstrates a state-by-state understanding of the term 'illegal,' the fact that such an amendment to the Comstock Act laws was proposed in 1978 and not acted upon might indicate an unwillingness to statutorily enact this definition.[21]

A strictly textual reading of the statute cuts against the broader narrowing construction the OLC wants to read into §§ 1461 and 1462, in addition to the local interpretation of this judicial construction. The history of anti-contraception laws in Connecticut before *Griswold v. Connecticut*, 381 U.S. 479 (1965) might prove illustrative of how a court could defer to the text of the statute when dealing with a potential prosecution under §§ 1461 or 1462. In *Buxton v. Ullman*, the court rejected the argument that a life-or-health-preserving medical exception should

[19] United States v. One Package, 86 F.2d 737, 739 (2d Cir. 1936).
[20] H.R. REP. No. 95-29 at 39-40 (1978), from the Subcommittee on Criminal Justice at 39-40 (1978).
[21] The proposed amendment was included as a part of the Criminal Justice Improvements Act, H.R. 13959, 95th Cong. (1978). The Act included a number of other proposed changes to Title 18 of the U.S. Code.

be read into an unenforced state anti-contraception statute by deferring to the separation of powers.[22] The Connecticut Supreme Court stated that "[c]ourts cannot, by the process of construction, abrogate a clear expression of legislative intent, especially when, as here, unambiguous language is fortified by the refusal of the legislature, in the light of judicial interpretation, to change it."[23] However, this textual reading might not be totally applicable given the renewed significance of the Comstock Act. In *Ullman*, The Supreme Court dismissed an appeal from another Connecticut ruling because they thought that there was no actual threat of prosecution under the statutes.[24] But now there are state attorneys general explicitly stating that they will look to enforce these laws.[25]

United States v. Bott provides an example of another way courts could approach the statue. In this early case applying the prohibitions on mailing materials "designed and intended for the prevention of conception or procuring of abortion,"[26] the court found that, in light of differing state laws, the intent required by the statute could not require the intent to prevent conception or to procure abortion to be an element of the offense at all.[27] "The prevention of abortion in the several states is not within the power which, under the constitution, belongs to the United States," and the only power Congress has is limited to the use of the mails.[28] So, the court

[22] Buxton v. Ullman, 147 Conn. 48, 57, 156 A.2d 508 (Conn. 1959). "In our tripartite system of government, the judiciary accords to the legislature the right to determine in the first instance what is." *Id.* at 55. *See also* State v. Nelson, 126 Conn. 412, 11 A.2d 856 (Conn. 1940); Tileston v. Ullman, 129 Conn. 84, 26 A.2d 582 (Conn. 1942); Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court before* Griswold v. Connecticut, 75 Iowa L. Rev. 915, 938 (1990) ("[t]he central focus of the court's analysis was always on deference to the state legislature").
[23] Buxton v. Ullman, 147 Conn. 48, 57, 156 A.2d 508, 513–14 (Conn. 1959).
[24] Poe v. Ullman, 367 U.S. 497, 508, 81 S. Ct. 1752, 1758, 6 L. Ed. 2d 989 (1961) ("This Court cannot be umpire to debates concerning harmless, empty shadows").
[25] Lauren Berg, *20 AGs Warn CVS, Walgreens Against Mailing Abortion Pills*, LAW 360 (Feb. 2, 2023) https://www.law360.com/articles/1572353/20-ags-warn-cvs-walgreens-against-mailing-abortion-pills.
[26] United States v. Bott, 24 F. Cas. 1204 (C.C.S.D.N.Y. 1873).
[27] *Bott*, 24 F. Cas. at 1204.
[28] *Id*.

found that "designed or intended for the prevention of conception or procuring abortion" does not describe the intent which must be an element of the crime against the United States.[29] Instead, it is descriptive of the material made contraband. "The unlawful act of depositing contraband matter, coupled with the intent to deposit such matter, constitutes the crime. The guilty intent appears from the fact of the deposit of such matter by one knowing what article he deposits."[30] Under such a reading of the law, whether or not the abortion was intended to comply with the relevant state law seems irrelevant.

This indicates that there are a variety of ways courts could apply the Comstock Act laws today. Proponents of enforcing the Comstock Act today argue that the OLC's construction is too complicated to be applied. In recent letters sent to CVS Health and Walgreens advising the corporations that their plans to provide abortion pills by mail-order pharmacy are illegal under federal law, a group of Republican attorneys general claimed that courts would defer to the plain text of the statutes.[31] They argued that 18 U.S.C. §1461 was "straightforward" and criticized the

[29] *Id*.
[30] *Id*.
[31] Letter to Danielle Gray, Executive Vice President of Walgreens Boots Alliance, Inc., from Kris W. Kobach, Kansas Attorney General (Feb. 6, 2023); Letter to Tom Moriarty, General Counsel of CVS Health, from Andrew Bailey, Missouri Attorney General, Steve Marshall, Alabama Attorney General, Treg Taylor, Alaska Attorney General, Tim Griffin, Arkansas Attorney General, Ashley Moody, Florida Attorney General, Chris Carr, Georgia Attorney General, Todd Rokita, Indiana Attorney General, Brenna Bird, Iowa Attorney General, Daniel Cameron, Kentucky Attorney General, Jeff Landry, Louisiana Attorney General, Lynn Fitch, Mississippi Attorney General, Austin Knudsen, Montana Attorney General, Drew Wrigley, North Dakota Attorney General, Dave Yost, Ohio Attorney General, Gentner F. Drummond, Oklahoma Attorney General, Alan Wilson, South Carolina Attorney General, Marty Jackley, South Dakota Attorney General, Ken Paxton, Texas Attorney General, Sean D. Reyes, Utah Attorney General, Patrick Morrisey, West Virginia Attorney General (Feb. 1, 2023); Letter to Danielle Gray, Executive Vice President of Walgreens Boots Alliance, Inc., from Andrew Bailey, Missouri Attorney General, Steve Marshall, Alabama Attorney General, Treg Taylor, Alaska Attorney General, Tim Griffin, Arkansas Attorney General, Ashley Moody, Florida Attorney General, Chris Carr, Georgia Attorney General, Todd Rokita, Indiana Attorney General, Brenna Bird, Iowa Attorney General, Daniel Cameron, Kentucky Attorney General, Jeff Landry, Louisiana Attorney General, Lynn Fitch, Mississippi Attorney General, Austin Knudsen, Montana Attorney General, Drew Wrigley, North Dakota Attorney General, Dave Yost, Ohio Attorney General, Gentner F. Drummond, Oklahoma Attorney General, Alan Wilson, South Carolina Attorney General, Marty Jackley, South Dakota Attorney General, Ken Paxton, Texas

Department of Justice for issuing an opinion that "ties itself in knots trying to explain away § 1461's prohibitions."[32]

The narrowing construction proposed by the OLC raises a lot of complicated issues. On the other hand, the plain text seems straightforward. But to adhere to the plain text and enforce the law today would be contrary to numerous judicial decisions and almost a century of executive action.[33]

IV. A VAGUENESS CHALLENGE TO THE COMSTOCK ACT LAWS

The complications raised by what criminal intent would be required by §§ 1461 and 1462 are more than just a hurdle to successful prosecution, as suggested by the OLC. This Note will show that, when considered along with their history of nonenforcement, the lack of clarity as to what is actually prohibited by these statutes demand that they should be found void for vagueness if ever enforced and constitutionally challenged. This is the case whether or not one accepts the local interpretation of the judicial construction advanced by the OLC. So, this Note goes beyond the OLC Opinion and makes the original argument that the Comstock Act laws are unenforceable in the present day because they are too vague.

Attorney General, Sean D. Reyes, Utah Attorney General, Patrick Morrisey, West Virginia Attorney General (Feb. 1, 2023). "We reject the Biden administration's bizarre interpretation, and we expect courts will as well. Courts do not lightly ignore the plain text of statutes.". Feb. 1 Letters to Tom Moriarty and Danielle Gray.

[32] Letter to Danielle Gray, Executive Vice President of Walgreens Boots Alliance, Inc., from Kris W. Kobach, Kansas Attorney General at 2 (Feb. 6, 2023).

[33] *See infra* Part I(C) and the lack of any prosecutions from 1900 to the present day under 18 U.S.C. §§ 1461 and 1462 for the mailing of surgical equipment intended for use in abortion procedures (revealed through an extensive search of Westlaw).

A. The Void for Vagueness Doctrine

Under the Due Process Clause of the Fifth Amendment, a criminal statute may be declared void if it is so vague that "men of common intelligence must necessarily guess at its meaning" and differ in their application of the law.[34] A penal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[35] The Supreme Court has applied the doctrine to statutes that are uncertain on their face, as well as those that are made unclear by judicial construction.[36]

The Supreme Court has recently expanded the void for vagueness doctrine, with *Johnson v. United States* 576 U.S. 591 (2015), *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *United States v. Davis,* 139 S. Ct. 2319 (2019) marking a trend from the Court's previous reluctance to void criminal statutes on this ground.[37] These decisions show that the void for vagueness has been taken seriously recently with respect to certain sentencing enhancements, indicating that the Court might examine vagueness within primary conduct more seriously than they have before.

[34] Winters v. New York, 333 U.S. 507, 518 (1948) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).
[35] Kolender v. Lawson, 461 U.S. 352, 357 (1983) (citing Village of Hoffman Estates v. Flipside, 455 U.S. 489 (1982); Smith v. Goguen, 415 U.S. 566 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Connally v. General Construction Co., 269 U.S. 385 (1926)).
[36] Bouie v. City of Columbia, 378 U.S. 347, 352 (1964) ("There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language."). Note that this applies to a judicial expanding, not narrowing, construction.
[37] *See* Melissa London, *Renewing the Vagueness Challenge to Crimes Involving Moral Turpitude*, 97 WASH. L. REV. 581, 617-620 (2022). See also Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 698 (2017) (noting that the Supreme Court only voided a law outside the First Amendment context for being unconstitutionally vague four times from 1960 until Johnson v. United States, 576 U.S. 591 (2015)).

There also seems to be a growing concern, articulated by Justice Gorsuch in his *Sessions* concurrence, that vague laws threaten the balance of separation of powers by granting too much power to the judges and prosecutors.[38] Unenforced laws with unclear application, such as §§ 1461 and 1462 implicate many of these same concerns.[39] In 2010, Justices Scalia, Thomas, and Kennedy supported voiding parts of the §§ 1341 and 1343 mail-fraud and wire-fraud statutes for vagueness.[40] Scalia argued that by using a judicial construction that "transform[ed] the prohibition of 'honest-services fraud' into a prohibition of 'bribery and kickbacks,'" the Court was "wielding a power we long ago abjured: the power to define new federal crimes."[41] Since a "criminal statute must clearly define the conduct it proscribes, [… a] statute that is unconstitutionally vague cannot be saved [] by judicial construction that writes in specific criteria that its text does not contain."[42] Therefore, Scalia found that Skilling was correct to argue that the statute "fails to provide fair notice and encourages arbitrary enforcement because it provides no definition of the right of honest services whose deprivation it prohibits."[43] The recent trend in Supreme Court decisions suggests that an argument like the one Skilling proposed has a better chance of success now than it did in 2010.

[38] Sessions v. Dimaya, 138 S. Ct. 1204, 1227–28 (2018). "Vague laws risk allowing judges to assume legislative power. Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions.". *Id*. at 1227-1228.
[39] *See* Desuetude, 119 HARV. L. REV. 2209, 2229 (2006) (summarizing the argument that when a prosecutor resurrects a desuete statute to bring an individual before a court, the executive essentially legislates through the reanimation of dead-letter laws). *See also* Alexander M. Bickel, *The Supreme Court, 1960 Term-Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 58-64 (1961) (making the same argument).
[40] Skilling v. United States, 561 U.S. 358, 415-424 (2010) (Scalia, J., concurring).
[41] *Id*. at 415.
[42] *Id*. at 415-416.
[43] *Id*. at 416.

B. The Local Interpretation of the Judicial Construction is Vague

The interpretation of the Comstock Act laws advanced by the OLC shows that the Comstock Laws are too vague to be workable. A federal criminal law regime that imports state regulations into its construction of the law is not in itself vague. However, a workable statute like 18 U.S.C. § 1955, the federal gambling statute, includes the limiting language and a definition the directly appeals to state laws in the text of the statute itself.[44]

By contrast, the importation of state regulations is not actually conferred in the text of the Comstock Act statutes.[45] A court applying 18 U.S.C. § 1461 would have to read the word "illegal" into the law and decide how "illegal" should be defined. Even using the local interpretation of the judicial construction seems to invite discretionary application of exactly which state laws to apply. Interstate mailing, unlike conducting business, implicates more than one state. Congress recognized that such a construction might be confusing when dealing with the anti-lottery mailing provision in 1976. By reading the word "illegal" to modify abortion in the Comstock Act Statutes, courts have created precisely the controversy that Congress decided to amend out of the lottery provision of Rev. Stat. § 3893.[46] The object of the amendment was to "secure uniformity and prohibit lottery circulars of any kind from passing through the mails," as the House recognized that the law as written resulted in the confusing situation where "[i]n some

[44] 18 U.S.C. § 1955, Prohibition of illegal gambling businesses ("As used in this section 'illegal gambling business' means a gambling business which… is a violation of the law of a State or political subdivision in which it is conducted….").
[45] 18 U.S.C. §§ 1461 and 1462. The lack of any limiting words in the text of the statute makes the judicial construction of such words open to indeterminacy and discriminatory application. Some courts might want to argue that "[i]n the absence of any words of limitation, the language used must be given its full and natural significance, and held to exclude from the mails every form of notice whereby the prohibited information is conveyed." United States v. Foote, 25 F. Cas. 1140, 1141 (C.C.S.D.N.Y. 1876).
[46] *See* H.R. 2575, 44th Cong. Section 2 (1876) (amending the lottery law to strike out the word "illegal" where it appeared before "lotteries," which reflected the concept that lotteries were legal in some state but not others). Senator Whythe from Maryland made a motion to strike out Section 2. The motion to strike out was not agreed to. Cong. Rec. (S) 4262-4264 (June 30, 1876).

states lotteries are legalized, in others they are prohibited, so that we have matters mailable in one State that are not mailable in another."[47] Mr. Hamlin stated that the Department "labor[ed] under [the difficulty of] determining what are and what are not legal lotteries."[48]

Determining the criminal intent required by the sender on a state-by-state basis would result in a similar difficulty. This would be exacerbated in cases involving importation from another country. Should the sender's intent be determined on the final destination state? Or the first state that the mail happens to reach? The choice of venue would also seem to promote arbitrary enforcement of the law. Unlike the mail fraud statutes, §§ 1461 and 1462 have no "built-in" venue provisions that would specify where a case might be brought, suggesting that a case might be brought in any state in which the mail passes through.[49] This would create an unacceptable result, as a sender might be subject to a number of differing standards of legality or illegality of an abortion.

C. The National Interpretation is also Unconstitutionally Vague

However, if one rejects the OLC's construction and demands a national definition of an "illegal abortion," there are even more reasons that the statute should be void for vagueness. Since there is no determined national standard for an 'illegal abortion,' such an interpretation would not give abortion providers any notice as to what conduct is actually prohibited by the law.

[47] 4 CONG. REC. 3656 (1876).
[48] 4 CONG. REC. 4262 (1876).
[49] 18 U.S.C. § 3237(a) provides that in cases where the offense was begun in one district and completed in another, venue may be laid in any district through which the offense was continued, unless otherwise explicitly provided, like in the case of mail fraud. Compare 18 U.S.C. § 1341 (carefully specificizing the locus of the offense) with 18 U.S.C. § 1461 which merely says "whoever knowingly uses the mails"). U.S. Dep't of Just., Just. Manual § 966, Venue in Mail Fraud (updated Jan. 21, 2020) https://www.justice.gov/archives/jm/criminal-resource-manual-966-venue-mail-fraud.

First, there is reason to think that such a construction would interfere with state's rights in a way that makes its application unclear. If the federal definition of "illegal abortion" was more restrictive than the definition in a given state, then abortion regulation decisions would essentially be taken away from the states. The interpretation of the federal statute needs to be constrained so that it does not interfere with matters of regulation traditionally reserved to the States. Otherwise, potential defendants could object to the enforcement of the federal statutes for encroaching upon the power of the states.[50] Although the similar anti-lottery mailing provision of Rev. Stat. § 3894 was held to be constitutional by the Supreme Court after the word "illegal" was removed in 1877,[51] this action was not undertaken without some pushback from Congress.[52] In this case, a national definition of an illegal abortion that imposed a federal restriction would not only be difficult to define and implement, it would also prevent states from advancing their state interest as articulated by *Dobbs*.[53]

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[50] *See* Bond v. United States, 564 U.S. 211 (2011) (finding that the petitioner, an indicted defendant, had standing to challenge the validity of the federal law he was convicted under for conflicting with constitutional principles of federalism). "An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable." *Id*. at 222. And *Dobbs* did explicitly reserve the matter of abortion regulation to the states. "The authority to regulate abortion is returned to the people and their elected representatives." Dobbs v. Jackson Women's Health Organization, 597 U.S. __ 142 S. Ct. 2228, 2234 (2022).

[51] Ex parte Jackson, 96 U.S. 727, 24 L. Ed. 877 (1877).

[52] 4 CONG. REC. 4262 (1876). "The second section goes a step further, and strikes out the word 'illegal,' so that in Louisiana, in Missouri, in Kentucky, where lotteries are legalized, no circular can be mailed at Louisville for Frankfort, for instance. Certainly the Senate does not mean to decide that the citizens of a State where lotteries are legal have no right to send a lottery scheme or circular front one portion of the State to another. That seems to me to be interfering with the rights of the people of the States where they choose to think that the sale of lottery tickets is not criminal or improper." *Id*. (statement by Mr. Wythe in support of not amending the law to remove the word 'illegal'). *See also* "I say, for one, that Congress has no right to prevent the carriage through the mail of such matters as are legalized by the States themselves." *Id*. (Mr. West, supporting Mr. Wythe's motion).

[53] *See* Stephen G. Gilles, *What Does* Dobbs *Mean for the Constitutional Right to a Life-or-Health-Preserving Abortion?* Forthcoming in 92 Miss. L.J. – at *13 (2022) (arguing that the right to a health-preserving abortion, as articulated in Planned Parenthood v. Casey, 505 U.S. 833 (1992) would be unworkable because it would deprive a State of the ability to advance a compelling state interest). Surely

However, this is assuming that one could even determine a national definition for an 'illegal abortion.' Under guidance from *Bours*, an 'illegal abortion' would be an abortion undertaken for some reason "inimical to the national life."[54] Although this would most likely exclude abortions undertaken to preserve the life of the mother, [55] it is unclear what other uses it would exclude or include. Does a health-preserving abortion enter the national standard?[56] Although such exceptions are more common in the present day, an early law state enacted in Washington, D.C. in 1901 criminalized abortion "unless when necessary to preserve [the woman's] life or health."[57]

It seems as if promoting women's health would not be "inimical to the national life."[58] But would such a reading of the narrowing construction also render the statutes void for vagueness? In *Colautti v. Franklin*, 439 U.S. 379 (1979), the Supreme Court found that a Pennsylvania state statute that used almost identical wording to the language of *Roe's* life-or-health exception was unconstitutionally vague. The statute required a doctor performing an abortion post-viability to employ an abortion technique that would provide the best opportunity for the fetus to be aborted alive unless a different technique would be "necessary in order to

allowing Congress to statutorily dictate what could be mailed to produce an abortion would also effectively limit a state's ability to regulate the protection of "potential life."

[54] Bours v. United States, 229 F. 960, 964 (7th Cir. 1915).

[55] *See* Stephen G. Gilles, *What Does* Dobbs *Mean for the Constitutional Right to a Life-or-Health-Preserving Abortion?* Forthcoming in 92 Miss. L.J. – at *6 (2022) ("the right to a life-preserving abortion has extremely strong support in our legal history and tradition"). *See also Id*. at *17 ("Without exception, the 19th-century statutes compiled in the Appendix to *Dobbs* permitted life-preserving abortions, and no State subsequently prohibited them.").

[56] Such a right was recognized by the Court in Roe v. Wade 410 U. S., 154 (1973) and it is uncertain whether it was overruled by Dobbs v. Jackson Women's Health Organization, 597 U.S. __ (2022). *See* Stephen G. Gilles, *What Does* Dobbs *Mean for the Constitutional Right to a Life-or-Health-Preserving Abortion?* Forthcoming in 92 Miss. L.J. (2022) (arguing that if *Dobbs* did not overrule *Roe* and *Casey in toto*, the constitutional right to a health-preserving abortion probably does not survive, while the constitutional right to a life-preserving abortion does).

[57] Dobbs v. Jackson Women's Health Organization, 597 U.S. __, Appendix B at 107 (2022).

[58] Bours v. United States, 229 F. 960, 964 (7th Cir. 1915).

preserve the life or health of the mother."[59] Because the statute did not specify whether the woman's life and health must always prevail over the fetus' life and health when they conflict, the Court found that this exception was so poorly defined that a doctor would not have fair warning as to what conduct was prohibited.[60] Similarly, 18 U.S.C. § 1461 makes no such specification, even though almost all courts would presumably allow the sending of abortion-related articles when necessary to save the woman's life as not for the purposes of an "illegal" abortion.[61]

Although the core vagueness the court identified in this statute was in defining "viability," the Court found the statute unconstitutionally vauge because it "conditions potential criminal liability on confusing and ambiguous criteria."[62] Even though viability is no longer a federal standard, a number of states still use fetal viability as a limit in their abortion statutes.[63]

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[59] Colautti v. Franklin, 439 U.S. 379, 379 (1979), abrogated by Dobbs v. Jackson Women's Health Org., 597 U.S. __, 142 S. Ct. 2228 (2022).

[60] Stephen G. Gilles, *Roe's Life-or-Health Exception: Self-Defense or Relative-Safety*, 85 Notre Dame L. Rev. 525, 567-568 (2010). *See Colautti*, 439 U.S. at 400-401 (""it is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a 'trade-off' between the woman's health and additional percentage points of fetal survival.… where conflicting duties of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions.").

[61] *See* Gilles *supra* note 168 at *17 (explaining why the right to a life-preserving abortion has a powerful claim to being deeply rooted in our legal history and tradition). "The early American statutes codifying the crime of abortion generally contained life-of-the-mother exceptions, or language from which courts could infer that a life-saving abortion would not be 'unlawful.' *Id*. Gilles even argues that the right to a life-saving abortion is a new implied constitutional right after *Dobbs*.

[62] *Colautti*, 439 U.S. at 394. Viability is no longer a federal standard. *Dobbs* overturned *Roe*'s holding that a woman has the right to choose to have an abortion before viability. ("The viability line, which *Casey* termed *Roe*'s central rule, makes no sense." Dobbs v. Jackson Women's Health Organization, 597 U.S. __, 142 S. Ct. 2228, 2282 (2022).

[63] California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Montana, New York, Rhode Island, Washington, and Wyoming still use "fetal viability" as a limit in their abortion statutes. *States with Gestational Limits for Abortion*, KAISER FAMILY FOUND. (last updated Jan. 20, 2023), https://www.kff.org/womens-health-policy/state-indicator/gestational-limit-abortions/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.

Does the importation of this state standard into the federal law make it void for vagueness for the same reasons as the statute in *Colautti*?[64]

To add to the confusion, the FDA has "determined the use of mifepristone in a regimen with misoprostol to be safe and effective for the medical termination of early pregnancy,"[65] leading some to argue that the FDA regulation of abortion regulation would preempt more restrictive state statutes.[66] It is unclear how FDA regulation would interact with a restrictive federal law. However, the FDA's blessing to dispense mifepristone for medical abortions by mail-order pharmacies and other telemedicine providers would indicate that such use is permitted under federal law, [67] despite the existence of the Comstock mailing provisions.

The problem of having to interpret the concept of an 'illegal abortion' under §§ 1461 and 1462 is compounded by the fact that Congress passed these laws so long ago and they were subsequently never enforced in the context of abortion-related articles. Attitudes towards the acceptability of abortion have vastly changed in the last century, along with sexual standards.[68] Should courts use modern standards of decency when interpreting the statute? Or should judges be forced to imagine what Congress in 1873 would have imagined as decent? These standards seem inapplicable to modern life for a multitude of reasons. Another issue with a criminal law that relies upon notions of decency is that these standards are constantly in flux. The Supreme

[64] "The perils of strict criminal liability are particularly acute here because of the uncertainty of the viability determination itself." *Colautti*, 439 U.S. at 395.
[65] *OLC Opinion supra* note 9 at 17.
[66] Peter Grossi and Daphne O'Connor, *FDA Preemption of Conflicting State Drug Regulation and the Looming Battle Over Abortion Medications*, DRAFT 10/24/22.
[67] FDA Response to American Association of Pro-Life Obstetricians and Gynecologists Citizen Petition, Docket No. FDA-2019-P-1534 (December 16, 2021) at 6. See also *Recent Guidance: Update to FDA's Risk Evaluation and Mitigation Strategy for Mifepristone on Dec. 16, 2021, Eliminating In-Person Dispensing Requirement*, 35 HARV. L. REV. 2238 (2022).
[68] R. Sauer, *Attitudes to Abortion in America, 1800-1973*, 28 POPULATION STUDIES 53, (1974).

Court has acknowledged that a criminal statute that incorporates "undeniably opaque" notions like decency into its terms "could raise substantial vagueness concerns."[69]

This struggle also reflects the desuete state of the Comstock Act laws. Since the laws have been unenforced for so long, the meaning has not had the chance to be tested or to evolve. The normative values behind vagueness challenges have been linked to the values that motivate the doctrine of desuetude before.[70] The Supreme Court should further expand the void for vagueness doctrine, in line with their recent decisions, by developing the normative basis of the vagueness doctrine to include concerns such as the lack of notice facing potential defendants that provide for the normative bases of the doctrine of desuetude.[71] This should reflect the idea that nonenforcement is a policy decision.[72] The decades of nonenforcement of the Comstock Act Laws should make one uncertain about how they should be applied in the present day, for these policy reasons, in addition to the practical hurdles facing their application. The very fact that a court could apply either a local or national definition of an "illegal abortion" when deciding this

[69] Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 571 (1998).
[70] *See Desuetude*, 119 HARV. L. REV. 2209, 2217 text accompanying n. 52-53 (2006); (citing ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 152-55 (Yale Univ. Press 2d ed. 1986) and Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 29-30, 73 (2003) as examples of scholars who argue that desuete statutes raise due process issues similar to those arising from unconstitutionally vague statutes.
[71] See John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531 (2014) (summarizing Bickel and Sunstein's contentions that fair notice and discriminatory enforcement problems are real constitutional concerns that have motivated decisions made on other grounds).
[72] Poe v. Ullman, 367 U.S. 497, 502 (1961) ("The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis."). Hillary Greene, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 YALE L. & POL'Y REV. 169, 185 (1997-1998) ("When the legislature completely acquiesces to executive nonenforcement for an extended period of time, nonenforcement must be taken as the legislature's intent as well as the executive's.").

law shows that it is open to arbitrary enforcement. So, what an 'illegal abortion' might be under this law is an unascertainable standard.[73]

A void for vagueness challenge to the criminal statute would also prevent the laws' secondary use through civil RICO lawsuits. Because RICO is predicated on criminal conduct, plaintiffs must plead and establish that each defendant "intended to engage in the conduct with actual knowledge of the illegal activities."[74] If the enforcement of the statutes was so vague as to obscure what conduct was actually criminal, no plaintiff could ever prove that there was such intent.

[73] See Michael J. Zydney Mannheimer, *Vagueness as Impossibility*, 98 TEXAS L. REV. 1049, 1049-50 (2020). ("A close look at the statutes that the Supreme Court has declared to be vague over the past century reveals that they generally share one of two defects: they require an actor to conform his conduct either to unknowable objective facts or to unascertainable normative standards. Such statutes violate Lord Coke's ancient dictum by requiring that persons perform the impossible.").
[74] JENNER & BLOCK *supra* note 90 at 10.

Applicant Details

First Name	**Brantley**
Last Name	**Butcher**
Citizenship Status	**U. S. Citizen**
Email Address	**brantleybutcher@uchicago.edu**
Address	**Address** Street **5454 S Shore Dr., Apt. 424** City **Chicago** State/Territory **Illinois** Zip **60615** Country **United States**
Contact Phone Number	**765-639-5993**

Applicant Education

BA/BS From	**Yale University**
Date of BA/BS	**May 2019**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Chicago Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Jessup International Law Moot Court** **Hinton Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hallett, Nicole
nhallett@uchicago.edu
773-702-9611
Kim, Hajin
hajin@uchicago.edu
773-702-9494
Huq, Aziz
huq@uchicago.edu
773-702-9566

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Brantley Butcher
5454 S. Shore Dr., Apt. 424
Chicago, IL 60615
brantleybutcher@uchicago.edu
(765) 639-5993

June 12, 2023

The Honorable Jamar K. Walker
United States District Judge
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year law student at the University of Chicago Law School. I write to apply for a clerkship in your chambers for the 2024–2025 term.

By serving as a judicial law clerk, I hope to hone the research and writing skills I have developed before and during law school. Before law school I worked as an editor at a pharmaceutical marketing agency, where I was promoted early to a managerial role in the editorial department. In law school I have written briefs filed in the Seventh Circuit through the Immigrants' Rights Clinic, edited my peers' work as a Comments Editor on *The University of Chicago Law Review*, and presented oral argument on a brief I wrote as a semifinalist in the Hinton Moot Court. During my law school summers, I have prepared research memoranda both as an intern in the Civil Fraud Section of the Department of Justice and as a summer associate at Jenner & Block in Washington, DC. Clerking in your chambers would allow me to build on these skills while deepening my knowledge of federal procedure and the federal courts.

A resume, transcript, and writing sample are enclosed. Letters of recommendation from Professors Nicole Hallett, Aziz Huq, and Hajin Kim will arrive under separate cover. Should you require additional information, please do not hesitate to reach out. Thank you for your consideration.

Sincerely,

/s/ Brantley Butcher

Brantley Butcher

brantleybutcher@uchicago.edu | (765) 639-5993 | 5454 S. Shore Dr., Apt. 424 | Chicago, IL 60615

Education

The University of Chicago Law School | Chicago, IL June 2024
Juris Doctor Candidate

Journal:	*The University of Chicago Law Review*, Comments Editor
Award:	Thomas R. Mulroy Prize for Excellence in Appellate Advocacy (awarded to Hinton Moot Court semifinalists)
Moot Courts:	Hinton Moot Court; Jessup International Law Moot Court
Activities:	OutLaw, Treasurer; Environmental Law Society, Events Coordinator; Orientation Leader

Yale University | New Haven, CT May 2019
Bachelor of Science in Chemistry

Capstone Essay:	Third-Generation Solar Cells and the Future of Solar Energy
Award:	Summer Ambassador 2017 (designed and won funding for a service project that delivered food to eleven families experiencing food insecurity in rural Indiana)

Experience

Jenner & Block | Washington, DC May 2023–July 2023
Incoming Summer Associate

The University of Chicago Law School, Immigrants' Rights Clinic | Chicago, IL Sept. 2022–Present
Student Attorney

- Collaborated with a team to research and write an appellate brief challenging a noncitizen's removability.
- Helped prepare asylum and green card applications for a noncitizen and his family.
- Provided legal guidance on immigration issues to members of Centro de Trabajadores Unidos.

The University of Chicago Law School, Professor Hajin Kim | Chicago, IL June 2022–Sept. 2022
Research Assistant (part time)

- Reviewed motions from mass tort cases that ended in settlement to gather data on how the framing of settlement values affects the settlement amount plaintiffs received.

Department of Justice, Civil Division | Washington, DC May 2022–July 2022
Commercial Litigation Branch, Fraud Section Intern

- Researched and wrote legal memoranda for cases involving Medicare, medical procurement, and defense procurement fraud litigated under the False Claims Act.
- Observed depositions and an investigatory interview and attended litigation strategy meetings.
- Reviewed a draft brief and suggested edits.

Communication Partners Group | New York, NY Oct. 2019–July 2021
Medical Associate Editor (Aug. 2020–July 2021)
Medical Editorial Assistant (Oct. 2019–Aug. 2020)

- Fact-checked, copyedited, proofread, and wrote copy for scientifically technical promotional materials created for client biotech and pharmaceutical companies.
- Corresponded with clients to ensure promotional materials met legal, educational, and brand requirements.
- Promoted early to managerial role. Managed and trained a newly hired editorial assistant.

Fahe | Lexington, KY May 2018–Aug. 2018
Policy and Membership Intern

- Researched and wrote memoranda on the economic impact of the opioid epidemic, treatments for opioid addiction, and access to rural healthcare for nonprofit that fights poverty in Appalachia.

Interests

Tennis, creative writing, science fiction novels/movies, and cooking

THE UNIVERSITY OF CHICAGO

Name: Brantley Allan Butcher
Student ID: 12335003

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

External Education

Yale University
New Haven, Connecticut
Bachelor of Science 2019

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law William Baude	3	3	177
LAWS	30211	Civil Procedure Diane Wood	4	4	177
LAWS	30611	Torts Saul Levmore	4	4	177
LAWS	30711	Legal Research and Writing Aneil Kovvali	1	1	180

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Jonathan Masur	4	4	180
LAWS	30411	Property Aziz Huq	4	4	178
LAWS	30511	Contracts Douglas Baird	4	4	178
LAWS	30711	Legal Research and Writing Aneil Kovvali	1	1	180

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Aneil Kovvali	2	2	182
LAWS	30713	Transactional Lawyering David A Weisbach	3	3	182
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Aziz Huq	3	3	179
LAWS	43368	Legal History of the Founding Era Farah Peterson	3	3	180
LAWS	44201	Legislation and Statutory Interpretation Farah Peterson	3	3	180

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	43200	Immigration Law Amber Hallett	3	3	182
LAWS	43228	Local Government Law Lee Fennell	3	3	179
LAWS	43246	Health Law and Policy Jack Bierig	3	3	178
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	2	0	
LAWS	95030	Moot Court Boot Camp Rebecca Horwitz Madeline Lansky	2	2	P

Honors/Awards
The Thomas R. Mulroy Prize, for excellence in appellate advocacy and oral argument in the Hinton Moot Court Competition

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	40101	Constitutional Law I: Governmental Structure David A Strauss	3	3	176
LAWS	40201	Constitutional Law II: Freedom of Speech Genevieve Lakier	3	3	177
LAWS	52003	Judicial Opinion Writing Robert Hochman Gary Feinerman	3	3	179
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	2	0	
LAWS	94110	The University of Chicago Law Review Anthony Casey	2	2	P
LAWS	95020	Hinton Moot Court Competition Anup Malani Sarah Konsky Hajin Kim	0	0	P

Date Issued: 06/11/2023

THE UNIVERSITY OF CHICAGO

Name: Brantley Allan Butcher
Student ID: 12335003

University of Chicago Law School

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence John Rappaport	3	3	177
LAWS	46001	Environmental Law: Air, Water, and Animals Hajin Kim	3	3	178
LAWS	53425	Constitutionalism After AI Aziz Huq	3	3	183
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	2	0	
LAWS	94110	The University of Chicago Law Review	1	1	P
Req Designation:		Meets Substantial Research Paper Requirement Anthony Casey			

End of University of Chicago Law School

OFFICIAL ACADEMIC DOCUMENT

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://csl.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

- I **Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
- IP **Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation.
- NGR **No Grade Reported:** No final grade submitted
- P **Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
- Q **Query:** No final grade submitted (College only)
- R **Registered:** Registered to audit the course
- S **Satisfactory**
- U **Unsatisfactory**
- UW **Unofficial Withdrawal**
- W **Withdrawal:** Does not affect GPA calculation
- WP **Withdrawal Passing:** Does not affect GPA calculation
- WF **Withdrawal Failing:** Does not affect GPA calculation
- **Blank:** If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

- H Honors Quality
- P* High Pass
- P Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website:
http://registrar.uchicago.edu.

Revised 09/2016

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THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL

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E-MAIL nhallett@uchicago.edu
www.law.uchicago.edu

Nicole Hallett
Clinical Professor of Law

May 17, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Brantley Butcher Clerkship Application

Dear Judge Walker:

I write to recommend Brantley Butcher for a clerkship in your chambers. I direct the Immigrants' Rights Clinic (IRC) at the University of Chicago Law School. IRC is an experiential course that enrolls eight to ten students per year. I meet with each student individually multiple times each quarter and meet with small student teams each week in addition to the weekly seminar. I also review and provide feedback on many drafts of work product throughout the year and observe and supervise fieldwork events such as client meetings and court appearances. Therefore, I get to know my clinic students very well and have the opportunity to observe them in many different contexts. Brantley joined IRC in September 2022 and I have worked with him for three consecutive quarters. Based on my experience, I believe Brantley will make a superb law clerk.

Brantley has worked on two cases this year, each of which has been challenging and complicated. In the first case, we represent a non-citizen with a final order of removal in a petition for review at the Seventh Circuit. The legal issue concerns the modified categorical approach and has required the students to learn an extremely complex and at times bewildering area of law in addition to understanding the state criminal offense underlying the issue. Brantley has taken the lead on both the principal and reply briefs. Although there are four students working on the case, I have observed that it is Brantley doing the lion's share of the work, His legal research skills have been second to none, and his legal writing skills are already highly developed and have only improved over the course of the year. In addition to writing the arguments I had identified, Brantley developed a novel legal argument that I had not identified based on his comprehensive review of the case law. Brantley was able to work through some potential problems with our arguments over long discussions in our team meetings. He was able to express his reservations about certain arguments succinctly and persuasively. Although oral argument has not been scheduled in the case yet, I plan to ask Brantley to do it given his leading role on the briefs and his prior experience with moot court.

In his other case, we represent a family of Afghans who were evacuated from Afghanistan during the U.S. withdrawal and are now applying for asylum and a special immigrant visa. On this case, I saw a different side of Brantley – his ability to develop trust client relationships, his attention to detail, and his ability to manage and juggle many competing tasks. While the other students on the team focused either on the Seventh Circuit brief or the asylum case, Brantley took a leading role on both. Last week, he called me while I was driving back from a speaking engagement. It was Friday evening and the students had aimed to get the special immigrant applications filed that week. Brantley was in the clinic, finishing up the applications by himself. He had a detailed list of questions that illustrated the immense care he had put into the project.

In sum, Brantley has many talents (as you can see not only from this letter but from the excellent grades Brantley has earned during his law school career). He is an excellent writer and an excellent teammate. He can navigate complex legal arguments in addition to handling the mundane details that are so important in the practice of law and in judicial chambers. I have no doubt that as a law clerk, you would be able to trust him to do a thorough and capable job drafting bench memos and opinions, in addition to all of the other tasks a law clerk must take on.

On a personal level, Brantley is a kind, gentle person who, if anything, cares too much about doing right by his clients, teammates, and supervisors. He is from Indiana (as am I), and I recognize in him a certain Midwestern humility that allows him to excel at what he does without coming across as arrogant or self-satisfied. Brantley is always thinking about how he can improve, how he can do more, how he can be helpful. If I were a judge, I would want to have Brantley in my chambers, and I do not say that about all of my students. Brantley is special and I look forward to seeing what he does in his career. I hope the first step can be a clerkship working for you. I would be happy to speak more about Brantley if it would be helpful to your decision. You can call me at 203-910-1980 or email me at nhallett@uchicago.edu.

Sincerely,

Nicole Hallett
Clinical Professor of Law
University of Chicago Law School

NH/z

Hajin Kim
Assistant Professor of Law
The University of Chicago Law School
1111 E. 60th St.
Chicago, IL 60637
hajin@uchicago.edu | 773-702-9494

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am excited to recommend Brantley Butcher as a clerk in your chambers. Brantley is a thoughtful and proactive student and delightful person.

I first got to know Brantley when he applied to be a part-time research assistant (RA) for me last summer. Brantley was working full time that summer for the Department of Justice, Civil Division, but he nonetheless used the hours he had for my research quite capably. I asked Brantley and another RA to help me find class action settlement pleadings that presented the settlement figures in different ways (in per person terms or in aggregate terms, summed across all individuals). Brantley took the lead in organizing the mass of materials the two collected, sent me detailed and well-ordered reports on his progress, asked excellent questions that pushed my thinking on the project, and pointed me to big picture issues with the analytical approach that came through from his close reading of the sources. He had a great sense of when to check in before plunging down a particular rabbit hole and, rather than reactively simply complete the tasks I assigned, Brantley proactively thought through how best to further the project. Brantley's work was excellent, and he was a pleasure to work with.

I was thus excited to see his name on Environmental Law class roster this Spring term. Brantley was a great in-class student – he spoke up with real contributions that I could tell he had thought through. He came to office hours with organized and thoughtful questions. He did well in the class, and I'd be thrilled to have him in future classes.

I'd like to make one note about his grades. Brantley's grades generally show an upward trend until Winter Quarter 2023. That quarter appears anomalous because of a heavy workload—outside of class, in addition to writing and arguing a brief in the Hinton Moot Court semifinals, submitting his Comment for Law Review, and writing half of a brief for another moot court, Brantley wrote a Seventh Circuit brief and filed asylum applications for his clinic.

On a personal level, Brantley has a wonderful, friendly demeanor and presence. He grew up in rural Indiana (his town has fewer than 3000 people), and he very much wants to give back to his underprivileged community and communities like it. In college, using funds from a college grant that he applied for, Brantley created a grocery-delivery service to help elementary school children over the summer months when they lose access to free lunch. He is also close with his family and delights in introducing his mom to new foods and experiences outside of those accessible to his family in their small town—apparently bubble tea is a new favorite.

I would be delighted to speak more at length about Brantley's candidacy if at all helpful.

Sincerely,

Hajin Kim
Assistant Professor of Law

Aziz Huq
Frank and Bernice J. Greenberg Professor of Law
University of Chicago Law School
1111 East 60th Street | Chicago, Illinois 60637
phone 773-702-9566 | fax 773-702-0730
email huq@uchicago.edu
www.law.uchicago.edu

May 15, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Brantley Butcher (University of Chicago Class of 2024), as a law clerk in your chambers. In the academic year 2021-22, I taught Brantley in a mandatory 1L course on Property and an elective 1L course on Constitutional Law (Equality and Due Process). He did very well in both of those classes. Brantley is further enrolled in a seminar I am teaching this term, which is entitled Constitutionalism after AI. To date, he has offered a very strong set of writings and oral contributions to that class. Brantley's very strong performance in my classes is consistent with a larger record of impressive performances across the law school curriculum across the first 18 months of his law school career. It was thus predictable that Brantley would earn a place on the prestigious University of Chicago Law Review, where he has gone on to a managerial role in his second year on the journal. My interactions with Brantley, in addition to his performance in my classes (both on the exam and also in person), strongly suggest that he will be a terrific law-clerk: He is poised, thoughtful, and analytically sharp. In person, he is respectful, but fulsome in his deployment of his formidable analytic resources. I think that any chambers would be rendered more effective, and more intellectually rich, thanks to Brantley's presence. I think would be true for both a district court position and an appellate position. I hence recommend him, without any hesitation, for those roles upon his graduation from the law school.

I will focus first on Brantley's academic performance, taking account of both how he did in my classes and also offering a perspective on his transcript as a whole. As noted, those two 1L classes were Property and Constitutional Law: Equal Protection and Due Process. They are very different in scope and focus. The first is a largely common-law class with a hefty dose of economics and political theory (e.g., Locke and Nozick). The second involves a great deal of history, and focuses on the way in which different moments in constitutional and political history have shaped the selection of controversies and the nature of the doctrinal rules that eventually emerge. The two classes, that is, are very different: They require somewhat different skill sets to excel. Yet in both classes, Brantley obtained a very high "B." In an era of grade inflation generally, this performance will not sound like much—but I want to stress without reservation that these are impressive grades. They place him within the top 15-20% or so each class. And they demonstrate more than enough legal skill to not just manage but to thrive in a federal clerkship. I looked back at Brantley's exams and found them well-written and clear: They suggest that he is a strong writer, even under considerable time pressures.

More generally, Brantley has offered as good or better a performance in almost all his other courses, with his grades getting better across the arc of his first year at the law school. Hence, Brantley has obtained very strong grades in classes as diverse as Transactional Lawyering. Immigration Law, Criminal Law, and Legal History (the Founding Period). This broad range of strong performances suggest that Brantley is not just intellectually capable, but also very nimble: He is able to move between very different topics and still grasp the essentials quickly. Indeed, it is telling that I am able to write a very strong recommendation for Brantley, and I am not even the person who gave him the best grades.

Brantley's grades, moreover, should be understood in the general context of Chicago assessment modalities. Unlike many other law schools, Chicago abjures grade inflation in favor of a very strict curve round a median score of 177 (which is a B in our argot). There is not large movement from the median. Because Chicago grades on a normal distribution, and because it is on the quarter system, it is possible to be very precise about where a student falls in a class as a whole. This is simply not possible with a grading system of the kind used by some of our peer schools, which are seemingly designed to render ambiguous and inscrutable differences between the second tier of students and the third- and fourth-tiers. In Chicago's reticulated grading system, Brantley's scores should be seen as very good ones. They demonstrate not just his deep legal skills, but his strength in comparison to his peers.

At Chicago more generally, Brantley has thrived. As I noted, he has obtained a place on the University of Chicago Law Review, where he is managing now the drafting and publication of comment (or notes) by other students. He also gave an excellent performance in the recent school-wide moot court, and he has participated in the interschool Jessup International Law Moot Court. In addition, he is an active member of both Outlaws and the Environmental Law Society. It is clear both from his record, and my sense of his presence around the law school, that Brantley is both engaged and well-respected by his peers. It is also clear to me that he is leaving the law school a better place than when he arrived.

On the personal side, Brantley is affable and a pleasure to chat with. It is no wonder he is so well liked. In part, Brantley's

character reflects his early life in an economically depressed area of rural Indiana, where dismaying few went to university after high school—let alone making it to an Ivy League school such as Yale. Brantley has maintained a soft-spoken humility (perhaps one that comes of switching from modest circumstances to the wealth and privilege of Yale), and has kept his eyes on the goal of continuing to contribute to his nation, and his community, through the law. This background also instilled an ethic of hard work in him: He had to study on his own for many early exams, including the SATs, the ACTs, and AP classes. He also faced the challenge of coming out in a deeply conservative culture, and then of reconciling his sexuality with his deeply felt Catholicism.

Finally, Brantley is in the process of accruing much useful legal experience that will be directly relevant to effective performance in a federal clerkship. Last summer, he worked at the Department of Justice's Civil Rights Division in Washington, DC. And this summer, he will be in Jenner and Block's Washington office. I anticipate that he will do very well in that position, and that he would come to federal clerkship with some practical legal skills already developed. I anticipate that he will go on to be either a judge or else find a path in public service of one sort or another after paying off his law-school loans.

Based on all this evidence, I anticipate that Brantley will perform very well in the demanding circumstances of a federal clerkship. I am very happy to offer my unqualified support for his application. Of course, I would be more than happy to answer any questions you have, and can be reached at your disposal at huq@uchicago.edu (and 703 702 9566).

Sincerely,

Aziz Huq
Frank and Bernice J. Greenberg Professor of Law

Writing Sample

I prepared this brief for the spring quarter of my Legal Research and Writing class at the University of Chicago Law School. For this assignment I represented appellant Danny Midway, who is appealing to the Seventh Circuit a holding by the district court that he lacks Article III standing. The assignment required independent research into the relevant case law. This writing sample represents my independent work. I did not receive editing help on the preliminary draft, submitted draft, or the version I submit to you today.

STATEMENT OF ISSUES

1. Whether the district court erred when it held Datavault's data breach, which exposed Danny Midway's social security number, credit card information, and other personal information to hackers, did not result in an injury in fact sufficient for Article III standing.

2. Whether Datavault's data breach caused judicially redressable injuries sufficient for Article III standing.

STATEMENT OF THE CASE

I. Statement of Facts

A. Datavault Failed to Protect Users' Sensitive Information from Hackers.

Davidson Datavault, LLC provides users with a digital vault to store usernames, passwords, and personal data. R3. Datavault markets itself as a service that protects customer privacy in a world plagued by online fraud and data breaches. *Id.*

To access the digital vault, users create a username and password. *Id.* Datavault creates an internal ID for each user. *Id.* The internal ID contains the user's first name, last name, and social security number. *Id.* Datavault also stores an encrypted version of users' vault password. R4. The encryption technology is the same used by Kovvali Industries in 2013 when it was hacked; researchers studying the hack could decrypt the stolen Kovvali Industries passwords in under two hours. R1 n.1.

To run its website, Datavault uses Shaffer Software. R5. On September 1, 2020, the Department of Homeland Security provided notice that Shaffer Software had a security vulnerability and that all users should immediately update to the latest version. R4. Datavault failed to update the software until October 1, 2020. R5.

Datavault's delay permitted hackers to exploit the vulnerability with an Alison Attack. *Id.* Hackers stole all Datavault users' internal IDs and encrypted vault passwords. *Id.* The hackers also downloaded the digital vaults. *Id.*

B. Datavault's Data Breach Led to Financial and Emotional Harms for Danny Midway.

Danny Midway is a recent college graduate and small business owner. R2. His small business sells collegiate apparel online and relies on bulk purchasing on credit to meet customers' demands. *Id.* Because credit and an online presence are vital to Midway's business, he used Datavault to protect and manage his credit card and password information. *Id.*

Datavault's data breach in September 2020 led to the theft of Midway's Datavault digital vault, which contained usernames and passwords for all his business's social media accounts, online storefronts, and finances; Midway's Datavault internal ID, which contained his social security number and full name; and Midway's encrypted Datavault password, which could be unencrypted with known methods. R5.

Midway is a previous victim of credit card fraud and thus knew what to do to prevent subsequent fraud and identity theft. R8. Midway accepted Datavault's offer of one year of free credit monitoring and identity theft services. R6. Midway also monitored his financial accounts every day and spent ten hours changing his passwords. *Id.* Because his business ran on tight margins that fraud or identity theft could threaten, Midway cancelled his credit card and placed a security freeze on his credit report. R6–8.

These measures to prevent harm after Datavault's data breach had deleterious consequences for Midway's business. Without a credit card and unable to open a new one due to the credit freeze, Midway could not obtain the inventory he needed to meet customer demand. R7. From October through November, Midway could only fulfill 100 out of 4,000 orders; he had

to cancel the remaining 3,900 orders. *Id.* Midway opened a new credit card in December 2020, but by that point the financial damage from the lost 3,900 orders had been done. *Id.*

The financial effects of Datavault's data breach and fear of identity theft led to substantial emotional distress. *Id.* The data breach exacerbated the anxiety from which Midway already suffered; he spent several sessions discussing the additional stress with his therapist. R8. The anxiety from Datavault's data breach also led to insomnia and trouble focusing on his work. *Id.*

II. Proceedings Below

Midway filed suit against Datavault on March 1, 2021, asserting claims of negligence and implied breach of contract. R8. Midway argued that due to the data breach, he (i) has an increased risk of identity theft and fraudulent credit charges; (ii) incurred costs to monitor and alter his financial accounts, including costs to his business; and (iii) suffered from emotional distress. R9–10. Midway argued any and all of these harms were an injury in fact. R10.

Datavault argued Midway lacked Article III standing, and the district court agreed. R9. The trial court only examined the requirement for injury in fact and held Midway's harms were insufficient. *Id.* The district court held Midway had failed to allege that he or any other Datavault user had experienced "fraudulent charge[s] or other symptoms of identity theft" following the breach. R11. The district court held that without evidence of fraud, Midway did not show a substantial risk of harm and could not manufacture standing through incurring protective costs. *Id.*

The district court granted Datavault's motion to dismiss under Rule 12(b)(1), dismissed Midway's complaint without prejudice, and entered judgment in favor of Datavault. *Id.* This timely appeal followed.

SUMMARY OF THE ARGUMENT

The district court erred when it dismissed Midway's suit for lack of standing due to lack of injury in fact. Midway's three alleged harms are all injuries in fact.

The first harm, an increased risk of identity theft and fraudulent credit charges, has precedential support as an injury in fact. This Court has previously held that hacks by their nature increase the risk of fraud and identity theft, and this increased risk is an injury in fact. Based on this precedent, this Court should reverse the district court's holding that Midway's increased risk of harm from the data breach was insufficient for standing.

The second harm, Midway's incurred costs to monitor and alter his financial accounts, including costs to his business, also has precedential support as an injury in fact. The record indicates harm was imminent, and this Court has held that money and time spent protecting oneself against imminent harm is an injury in fact.

The third harm, emotional distress, is also an injury in fact. While minor emotional distress is not an injury in fact, physical manifestations of emotional distress and medical diagnoses arising from emotional distress are injuries in fact. Midway experienced physical manifestations of stress from the data breach and required additional medical treatment due to stress, both of which are injuries sufficient for Article III standing.

While the district court did not address causation and judicial redressability, both are met based on the facts provided. Midway thus has Article III standing, and this case should be remanded to the district court for proceedings on the merits.

ARGUMENT

I. Standard of Review

This Court reviews dismissals for lack of Article III standing *de novo*. *Remijas v. Neiman Marcus Group, LLC*, 749 F.3d 688, 691 (7th Cir. 2015).

II. The District Court Erred When It Held Midway Lacked Article III Standing.

The Supreme Court has established three requirements to show standing: "(i) that [the plaintiff] suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion, LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

The district court applied the correct standard but improperly interpreted the requirements for injury in fact. Because injury in fact is the only factor the district court examined, this brief will focus on showing that Midway's injuries granted him Article III standing. Causation and redressability were also met and will be briefly addressed, but any remaining substantial questions should be remanded to the district court for further consideration.

III. Datavault's Data Breach Created Injury in Fact for Midway Through Increased Risk of Fraud and Identity Theft, the Cost of Protective Measures, and Emotional Damage.

The district court improperly dismissed the injuries in fact that Datavault inflicted on Midway. Midway's harms from Datavault's data breach included (i) an increased risk of identity theft and fraudulent credit charges; (ii) costs to monitor and alter his financial accounts, including costs to his business; and (iii) emotional distress. This Court in previous cases has acknowledged all three of these harms as injuries in fact.

A. Midway Experienced an Increased Risk of Identity Theft and Fraudulent Credit Card Charges, Which This Court Has Recognized as an Injury in Fact.

1. Hacks by Their Nature Create Increased Risks of Fraud and Identity Theft.

This Court's leading data breach case *Remijas v. Neiman Marcus*, 749 F.3d 688 (7th Cir. 2015) established that an increased risk of credit card fraud and identity theft is an injury in fact. In *Remijas* a class of shoppers whose credit card information was potentially exposed in a hack of Neiman Marcus sued the retailer for damages arising from exposure of their private information. *Id.* at 690. Even though only a small fraction of the class had experienced fraudulent charges, this Court held that an increased risk of fraudulent charges and identity theft were injuries in fact sufficient for Article III standing for the entire class. *Id.* at 690, 692.

The *Remijas* court cited *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013) in its holding. The Supreme Court in *Clapper* held that future harms can be injuries in fact if they are "certainly impending" as opposed to mere "allegations of possible future injury." *Remijas*, 749 F.3d at 692 (citing *Clapper*, 568 U.S. at 409). However, the Supreme Court in *Clapper* explicitly rejected that "certainly impending" means "literally certain"; it can also mean "a 'substantial risk' that harm will occur." *Id.* at 693 (quoting *Clapper*, 568 U.S. at 414 n. 5).

This circuit in *Remijas* found that hacks by their nature create this substantial risk. This Court wrote, "Why else would hackers break into a store's database and steal consumers' private information? Presumably the purpose of the hack is, sooner or later, to make fraudulent charges or assume those consumers' identities." *Id.* at 693. It worried that forcing plaintiffs to wait until fraud or theft occurs would make proving the causal relationship to the hack difficult, which would protect negligent defendants. *Id.* (citing *In re Adobe Sys.*, 66 F.Supp.3d 1197, 1215 n. 5 (N.D. Cal. 2014)).

This previous holding that hacks by their nature create an injury in fact shows that the district court erred when it held Midway's increased risks of identity theft and fraud were not injuries in fact. Hackers stole Midway's sensitive information from Datavault. Like in *Remijas*, an assumption should be made that the Datavault hackers stole Midway's information with the intent of committing fraud or identity theft. *Id.* at 690. The nature-of-a-hack reasoning from *Remijas* pushes the increased risks of fraud or identity theft from "allegations of possible future harm" to "certainly impending" harms, which are injuries in fact for Article III standing. *Id.* at 692 (citing *Clapper*, 568 U.S. at 409).

Indeed, Datavault's data breach is even more likely to create impending harm than the breach in *Remijas*. The Datavault hackers targeted a company that primarily holds sensitive information. As this Court wrote, hackers only steal information they plan to misuse. *Id.* at 690. While the password to access Midway's data vault is encrypted, hackers sophisticated enough to launch this type of hack will be sophisticated enough to unencrypt passwords. *See* R1 n.1 (unencrypting passwords encrypted with the same technology Datavault uses only took two hours). Thus, Midway has a substantially increased risk of experiencing credit card fraud and identity theft from Datavault's data breach, which is an injury in fact for Article III standing.

2. The District Court Improperly Applied the Standard from *Remijas*.

The district court in this case erred when it failed to apply the proper standard from *Remijas*. Instead of the controlling standard from *Remijas*, the district court relied upon a rule improperly crafted in the nonbinding case *Kylie S. v. Pearson PLC*, 475 F.Supp.3d 841 (N.D. Ill. 2020). R10.

The district court in *Kylie* improperly created a rigid rule from the more liberal *Remijas* standard. The *Kylie* court derived two factors from *Remijas* for determining if there is a material

threat of identity theft: "(i) the sensitivity of the data in question . . . and (ii) the incidence of fraudulent charges and other symptoms of identity theft." R10 (citing *Kylie*, 475 F.Supp.3d at 846). While *Kylie* cites *Remijas*, the *Remijas* court did not create the rigid rule espoused in *Kylie*. Instead, it created a liberal standard based on the nature of a hack. *See Remijas*, 749 F.3d at 693. The rigid rule should not have been created in *Kylie* and should not have been applied to Midway's injuries.

But even if this circuit embraces the *Kylie* rule, Midway still experienced an injury in fact. The *Kylie* rule only addresses an increased risk of identity theft, not credit card fraud. *See Kylie*, 475 F.Supp.3d at 846 ("Whether a data breach exposes consumers to a material threat of *identity theft* turns on two factors that derive from *Remijas*") (emphasis added). Due to material differences in credit card fraud and identity theft (e.g., credit card fraud is easier to commit), the rule from *Kylie* does not prevent an increased risk of credit card fraud from constituting an injury in fact.

3. *TransUnion* and *Pierre* Do Not Apply to Cases Like Midway's Where There Are Concrete and Ongoing Risks Created by a Data Breach.

The Supreme Court case *TransUnion, LLC v. Ramirez*, 141 S. Ct. 2190 (2021) does not foreclose standing for Midway. The plaintiffs in *TransUnion* alleged risks that were purely hypothetical, which are fundamentally different from the concrete risks Midway alleges. For this reason, the holding from *TransUnion* does not control in Midway's case.

In *TransUnion* a class sued a credit reporting agency for incorrectly identifying individuals as "specially designated nationals" on credit reports, a designation that prevented class members from receiving credit. *TransUnion*, 141 S. Ct. at 2201–02. The class consisted of those whose incorrect credit reports had been sent to third parties and those whose incorrect credit reports had not been sent to third parties. *Id.* at 2202. The Court held that only those whose

incorrect reports had been sent to third parties had standing. *Id.* at 2209. Those whose incorrect reports had not been sent to third parties did not have standing because they could not show a concrete injury in fact. *Id.* at 2212.

The plaintiffs in *TransUnion* alleged only hypothetical harms, which are different from the concrete and ongoing harms that Midway alleges. In *TransUnion*, TransUnion either harmed or did not harm plaintiffs: incorrect reports were either sent or not sent. TransUnion also corrected its error, creating no risk of future harm for those whose reports had not been sent. *Id.* at 2202. Midway's injury is different. Midway's private information—his social security number, credit card information, and passwords—were stolen. Once private information becomes public, it cannot become private again. Unlike TransUnion in *TransUnion*, Datavault created a real and ongoing risk of fraud or theft for Midway that cannot be corrected. Because Midway's injury is concrete and not purely hypothetical, *TransUnion* is inapplicable.

For similar reasons *Pierre v. Midland Credit Management*, *Inc.*, 29 F.4th 934 (7th Cir. 2022) does not jeopardize Midway's standing. This Court in *Pierre*, relying on *TransUnion*, held that plaintiffs did not experience a concrete injury based solely on the risk that those in the class could have been tricked by a letter. *Pierre*, 29 F.4th at 937. The risk in *Pierre* was a purely hypothetical harm like the harm alleged in *TransUnion*. This hypothetical injury in *Pierre* is fundamentally different from the concrete risk of fraud and identity theft that Midway experiences. Thus, this Court's holding in *Pierre* is inapplicable to Midway's case.

B. Datavault's Data Breach Led Midway to Incur Costs to Monitor and Alter His Financial Accounts to Prevent Imminent Injury, Which Is an Injury in Fact.

1. This Court's Precedent Shows that Credit Monitoring, Changing Passwords, Cancelling Credit Cards, and Freezing Credit Reports Are Injuries in Fact.

This Court has held that actions undertaken to protect oneself from identity theft and fraud can constitute injuries in fact. While "plaintiffs 'cannot manufacture standing by incurring

costs in anticipation of non-imminent harm,'" *Remijas*, 794 F.3d at 694 (quoting *Clapper*, 568 U.S. at 1155), not all actions taken to protect oneself against further harm are manufactured harms. Actions taken to prevent or ameliorate an imminent harm are different from actions taken when harm is only speculative. *Id.*; *see also Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 967 (7th Cir. 2016). In *Remijas* Neiman Marcus's offer of credit monitoring and identity-theft protection after its breach showed a need for these services, and the need showed the harm was imminent and nonspeculative. *Remijas*, 794 F.3d at 694. Because the harm was imminent, actions taken by Neiman Marcus shoppers to prevent the harm, such as paying for credit monitoring services, "easily qualified as a concrete injury." *Id*.

Midway and Datavault took several of the same protective measures as the plaintiffs and defendant in *Remijas*. After the data breach, Datavault offered free credit monitoring and identity fraud protection. Like in *Remijas*, this Court should interpret this action as recognition of a need for the services, which is also a recognition of an imminent, nonspeculative harm. *Id.* at 694; *Lewert*, 819 F.3d at 967. Because Midway's harm after Datavault's data breach was imminent, actions he took to protect himself from the harm are injuries in fact. Thus, the time Midway spent monitoring credit reports, changing passwords, cancelling credit cards, and freezing his credit report constitutes an injury in fact. *See Remijas*, 794 F.3d at 694; *Lewert*, 819 F.3d at 967.

2. Financial Harm to Midway's Business Created an Injury in Fact.

The Supreme Court in *TransUnion* found that financial harm is an injury in fact. In *TransUnion* the Supreme Court wrote that harms can be concrete injuries in fact if there is a "close relationship" to a harm "traditionally" recognized as providing a basis for a lawsuit. *TransUnion*, 141 S. Ct. at 2204 (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)). However, the harm does not have to be an exact historical duplicate. *Id.* One of these traditional

harms that the court recognized as a concrete injury in fact was "physical or monetary injury to the plaintiff." *Id.*

The business harm Midway experienced from Datavault's data breach is a financial harm, which is an injury in fact under *TransUnion*. After the data breach, Midway froze his business's credit line to prevent fraudulent charges. But this action also prevented Midway from purchasing on credit needed inventory to make sales, which created a financial harm. Midway's financial harm was a direct result of protective measures he took to prevent the imminent threat from Datavault's data breach. Protective measures after a data breach are harms traditionally recognized by this Court as concrete injuries in fact. *See Remijas*, 794 F.3d at 694; *Lewert*, 819 F.3d at 967. The loss in sales is also a monetary damage, which *TransUnion* stated is generally an injury in fact for Article III standing. *TransUnion*, 141 S. Ct. at 2204. Under this *TransUnion* standard, the financial harms Midway experienced to protect his business are injuries in fact.

C. Midway's Physical and Medical Harms from Emotional Distress from the Data Breach Are Injuries in Fact.

As a result of Datavault's data breach, Midway experienced increased stress and anxiety. R8. The increased stress and anxiety gave him insomnia and made focusing difficult. *Id.* The data breach also forced him to attend additional therapy sessions to control his heightened anxiety. *Id.* These physical and medical harms from the emotional distress caused by the data breach are injuries in fact.

By itself, Midway's emotional distress is not an injury in fact. The *Pierre* court held that confusion and worry are not concrete injuries. *Pierre*, 29 F.4th at 939 (citing *Markakos v. Medicredit, Inc.*, 997 F.3d 778, 781 (7th Cir. 2021)). Similarly, this Court in *Wadsworth* held that plaintiff's "personal humiliation, embarrassment, mental anguish and emotional distress"

were insufficiently concrete injuries. *Wadsworth v. Kross, Lieberman & Stone, Inc.*, 12 F.4th 665, 668 (7th Cir. 2021).

Nonetheless, emotional distress can be a concrete injury in fact when there are physical manifestations of or medical diagnoses from the distress. The Supreme Court in *TransUnion* stated that at least some forms of emotional harm can be a concrete injury in fact. *See TransUnion*, 141 S. Ct. at 2211 ("Nor did those plaintiffs present evidence that the class members were independently harmed by their exposure to the risk itself—that is, that they suffered some other injury (such as an emotional injury) from the mere risk . . ."). This Court in *Pennell* stated stress without physical manifestations or a medical diagnosis is insufficient for a concrete injury, implying that physical manifestations of distress or a medical diagnosis would create an injury in fact. *Pennell v. Global Trust Management, LLC*, 990 F.3d 1041, 1045 (7th Cir. 2021) (citing *United States v. All Funds on Deposit with R.J. O'Brien & Assocs.*, 783 F.3d 607, 616 (7th Cir. 2015)).

Midway has experienced physical manifestations of his emotional distress and required additional medical care due to the data breach. As a result of the stress and anxiety from the data breach, Midway experienced insomnia and an inability to focus. R8. The stress from Datavault's data breach also exasperated Midway's anxiety. *Id.* While the data breach did not give Midway a new anxiety disorder, Datavault's negligent management of Midway's information inflamed a condition that was already present. These physical manifestations of emotional distress and the exasperation of a medical condition are injuries in fact under *Pennell* and *TransUnion*.

IV. Datavault's Data Breach Caused Midway's Increased Risk of Identity Theft, Incurred Cost of Protective Measures, and Emotional Damage.

The district court did not reach the question of causation. Nonetheless, the causation requirement for Article III standing is met under the facts provided.

This Court has held that the company that data is stolen from caused the injury to those whose private or financial information was stolen. *See Remijas*, 794 F.3d at 688; *Lewert*, 819 F.3d at 963. Applying this precedent, Datavault was the cause of Midway's injuries for purposes of Article III standing.

This Court has rejected arguments that previous data breaches can negate causation. *See Remijas*, 794 F.3d at 696 ("The fact that . . . some other store *might* have caused the plaintiff's private information to be exposed does nothing to negative the plaintiff's standing to sue."). The previous credit card fraud Midway experienced thus does not prevent Midway from showing that Datavault was the cause of his injury in this case.

Should this court have any remaining questions of causation, the case should be remanded to the trial court for additional fact finding.

V. Midway's Injuries Are Judicially Redressable Through Monetary Damages.

The district court did not reach the question of judicial redressability, but Midway's injuries are clearly redressable through judicial action. Midway's injuries—the time and money spent on protective measures, the financial damage to his business, the cost of extra therapy, etc.—can all be redressed through monetary compensation.

Should this court have any remaining questions regarding judicial redressability, this case should be remanded to the trial court for additional fact finding.

CONCLUSION

Danny Midway has Article III standing. The district's court's dismissal should be reversed and the case remanded for a trial on the merits.

Applicant Details

First Name	**Madison**
Middle Initial	**L**
Last Name	**Butler**
Citizenship Status	**U. S. Citizen**
Email Address	**madisb@umich.edu**
Address	**Address** Street **315 2nd St, Apt. 415** City **ANN ARBOR** State/Territory **Michigan** Zip **48103-4991** Country **United States**
Contact Phone Number	**5405297928**

Applicant Education

BA/BS From	**University of Virginia**
Date of BA/BS	**May 2018**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 6, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Journal of Gender & Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

MADISON BUTLER
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June 12, 2023

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a rising third-year student at the University of Michigan Law School, and I am writing to apply for a clerkship in your chambers for the 2024-2025 term. Having been born in Roanoke, VA, and spending most of my life in the Commonwealth, I would love to begin my legal career in your chambers.

Before law school, I worked as a paralegal at Morgan, Lewis & Bockius in Washington, DC, which allowed me to improve my skills in writing, working on a team of diverse personalities, and producing quality work under pressure. I pride myself on my loyalty and the relationships I have built throughout my career. The best evidence of those strengths is that Morgan Lewis invited me back last summer as a 1L Summer Litigation Clerk. Then, because of my research and writing work product, Morgan Lewis also asked me to return this summer as a Summer Associate. I also pride myself on my adaptability. After my 1L year at Washington & Lee, I transferred to Michigan Law. While this was challenging, I quickly found my place and created meaningful relationships with my classmates. My peers recognized my interpersonal and leadership skills and elected me to serve as Executive Editor for the Michigan Journal of Gender & Law. I will bring these professional and personal strengths to your chambers to help promote a collaborative and productive work environment. I enjoy working on a close-knit team, and I hope to have the opportunity to join yours after law school.

I have attached my resume, undergraduate transcript, and a writing sample for your review. Letters of recommendation from the following professors are also attached:

- Professor Joan Shaughnessy: shaughnessyj@wlu.edu, (540) 458-8512
- Professor Samuel Erman: samerman@umich.edu, 734-763-3806
- Professor Kerry Kornblatt: kkorn@umich.edu, (734) 647-8595

Thank you for your time and consideration.

Respectfully,

Madison Butler

MADISON BUTLER

315 2nd St., Apt. 415, Ann Arbor, MI 48103 • (540) 529-7928 • madisb@umich.edu

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — **Ann Arbor, Michigan**
Juris Doctor — GPA: 3.685 — Expected May 2024
Journal: Michigan Journal of Gender & Law, *Executive Editor,* Vol. 30.2
Activities: Student Sexual Assault and Harassment Legal Advocacy Service, *Guidance Co-Chair*
Women Law Students Association
First-year J.D. Coursework completed at Washington & Lee School of Law (Top 10%)

UNIVERSITY OF VIRGINIA — **Charlottesville, VA**
Bachelor of Arts, *Foreign Affairs* — May 2018
Minor: Women, Gender, and Sexuality
Activities: Gamma Phi Beta Sorority, *Bid Day Chairwoman*
Phi Alpha Delta Pre-Law Fraternity, *Publicity Committee Member*

EXPERIENCE

Morgan, Lewis & Bockius LLP — **Washington, DC**
2L Summer Associate — **May 2023 – August 2023**
1L Summer Litigation Clerk — **May 2022 – August 2022**

- Researched case law to advise client on potential jurisdictional issues in a federal diversity case.
- Researched the application of insurance policies to additional insureds to advise client on insurance recovery issues.
- Analyzed historical SEC filings, annual reports, and newspaper articles to create timelines of new clients' business operations.
- Drafted and submitted settlement recommendations for client review.
- Reviewed voluminous Naval ship records for product identification to assess clients' litigation risks.

University of Michigan Civil-Criminal Litigation Clinic — **Ann Arbor, Michigan**
Student Attorney — **January 2023 – May 2023**

- Drafted and revised court filings, such as answers to complaints, witness lists, exhibit lists, and jury instructions.
- Negotiated with opposing counsel regarding settlements in landlord-tenant matters.
- Counseled clients in various litigation matters including expungements of criminal convictions and eviction proceedings.
- Appeared on record in hearings representing clients in litigation matters including expungements and eviction proceedings.

Morgan, Lewis & Bockius LLP — **Washington, DC**
Litigation Paralegal — **June 2018 – May 2021**

- Drafted and submitted settlement recommendations for client review.
- Drafted and proofread court filings, such as answers to complaints, witness lists, and motions for summary judgment.
- Trained new paralegals on docket management.
- Received *"Going the Distance Award"* February and December 2020 for significant contribution to litigation group.
- Exceeded minimum hours required to meet Pro Bono Challenge (2019 & 2020).

Southern Environmental Law Center — **Charlottesville, VA**
Legal Research Intern — **January 2018 – May 2018**

- Assisted with lobbying efforts by researching and analyzing academic articles regarding environmental legal issues.
- Drafted memoranda to supervising attorney summarizing research findings.

ADDITIONAL

- Worked as a seasonal YMCA Swim Instructor and Lifeguard. — **June 2011 – February 2020**
- Interests: Barre (Instructor at Studio Barre 2020-2021), attending sporting events, baking, traveling

WASHINGTON AND LEE UNIVERSITY
OFFICE OF THE UNIVERSITY REGISTRAR
Lexington, Virginia 24450-2116
540.458.8455

Student's Name: Ms. Madison Leanne Butler
Butler, Madison L.
Date Produced: 06/06/2022

Entered: 08/30/2021 as LAW:FIRST-YEAR STU
Current Program: Law
Class: 2024
Current Status: On Campus

Major:
Other Ed: BA UNIVERSITY OF VIRGINIA Charlottesville VA 22906

SSN: ***-**-9084
Student ID: 1737547
Birthdate: 10/13/****

COURSE			ATT	COM	GRADE	POINTS
LAW-FALL SEMESTER 2021-22						
LAW	109	CIVIL PROCEDURE	4.0	4.0	A	16.00
LAW	140	CONTRACTS	4.0	4.0	B+	13.32
LAW	163	LEGAL RESEARCH	0.5	0.5	B+	1.67
LAW	165	LEGAL WRITING I	2.0	2.0	A-	7.34
LAW	190	TORTS	4.0	4.0	A	16.00
Term	Cmpl Cr: 14.5	GPA Pts: 54.33	GPA Cr: 14.5		GPA: 3.747	
Cumul	Cmpl Cr: 14.5	GPA Pts: 54.33	GPA Cr: 14.5		GPA: 3.747	
LAW-SPRING SEMESTER 2021-22						
LAW	130	CONSTITUTIONAL LAW	4.0	4.0	A-	14.68
LAW	150	CRIMINAL LAW	3.0	3.0	B+	9.99
LAW	163	LEGAL RESEARCH	0.5	0.5	B+	1.67
LAW	166	LEGAL WRITING II	2.0	2.0	A-	7.34
LAW	179	PROPERTY	4.0	4.0	A	16.00
LAW	195	TRANSNATIONAL LAW	3.0	3.0	A-	11.01
Term	Cmpl Cr: 16.5	GPA Pts: 60.69	GPA Cr: 16.5		GPA: 3.678	
Year	Cmpl Cr: 31.0	GPA Pts: 115.02	GPA Cr: 31.0		GPA: 3.710	
Cumul	Cmpl Cr: 31.0	GPA Pts: 115.01	GPA Cr: 31.0		GPA: 3.710	

***** END OF TRANSCRIPT *****

LAW-FALL SEMESTER 2022-23 CURRENT OR FUTURE REGISTRATION			
LAW	685	EVIDENCE	3.0
LAW	700	FEDERAL JURISDICTION AND PROCEDU	3.0
LAW	701	ADMINISTRATIVE LAW	3.0
LAW	652	CORPORATE SOCIAL RESPONSIBILITY	2.0
LAW	801	HIGHER EDUCATION PRACTICUM	4.0

Registrar

Control No: E196920401 Issue Date: 06/06/2023 Page 1

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Butler,Madison L
Student#: 14582351

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Transfer course credit accepted toward a law degree.								
			Washington and Lee University				31.00	
Cumulative Total							**31.00**	
Fall 2022			**(August 29, 2022 To December 16, 2022)**					
LAW	406	001	Real Estate Transactions	John Cameron Jr	2.00	2.00	2.00	A
LAW	483	001	Judicial Clerkships	Kerry Kornblatt	2.00	2.00	2.00	A-
LAW	569	001	Legislation and Regulation	Daniel Deacon	4.00	4.00	4.00	B+
LAW	669	002	Evidence	David Moran	3.00	3.00	3.00	B+
LAW	885	002	Mini-Seminar	Imran Syed	1.00		1.00	S
			Criminal Justice Reform by Comedian Jon Oliver					
LAW	896	001	Critical Race Theory	Samuel Erman	2.00	2.00	2.00	A
Term Total				**GPA: 3.576**	**14.00**	**13.00**	**14.00**	
Cumulative Total				**GPA: 3.576**		**13.00**	**45.00**	
Winter 2023			**(January 11, 2023 To May 04, 2023)**					
LAW	712	001	Negotiation	George Kimball	3.00	3.00	3.00	A-
LAW	737	001	Higher Education Law	Jack Bernard	4.00	4.00	4.00	A-
LAW	920	001	Civil-Criminal Litigation Clnc	David Santacroce Victoria Clark	4.00	4.00	4.00	A
LAW	921	001	Civil-Criminal Litig Clnc Sem	David Santacroce Victoria Clark	3.00	3.00	3.00	A-
Term Total				**GPA: 3.785**	**14.00**	**14.00**	**14.00**	
Cumulative Total				**GPA: 3.685**		**27.00**	**59.00**	

Continued next page >

Control No: E196920401 Issue Date: 06/06/2023 Page 2

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Butler,Madison L
Student#: 14582351

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2023	**(August 28, 2023 To December 15, 2023)**							
Elections as of:	06/06/2023							
LAW	439	001	Title IX and Higher Education	Rebecca Veidlinger	2.00			
LAW	536	001	Nat'l Security & Civ Liberties	Barbara Mcquade	3.00			
LAW	670	001	Gender and Law	Ellen Katz	3.00			
LAW	685	001	Design Fulfilling Life in Law	Bridgette Carr Vivek Sankaran	2.00			
LAW	771	001	Progres Prosecution: Law&Pol'y	Eli Savit Victoria Burton-Harris	2.00			

End of Transcript
Total Number of Pages 2

This transcript is printed on special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required.

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University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

Official Copies

An official copy of a student's University of Michigan Law School Cumulative Grade Report and Academic Record is printed on a special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required. A black and white is not an original. Any alteration or modification of this record or any copy thereof may constitute a felony and/or lead to student disciplinary sanctions.

The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

University of Michigan Law School
625 S. State Street
Ann Arbor, MI 48109

Samuel Erman
Professor of Law

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Madison Butler as a law clerk. I know Madison as a student from my Fall 2022 seminar on Critical Race Theory. She is a curious, enthusiastic student who brings out the best in those around her.

To provide you some background, my Critical Race Theory seminar has three components. Two involve the readings for the seminar, which are foundational works in critical race theory. First, students write nine short papers reacting to the weeks' readings. Second, we discuss the readings and the students' papers in class. Here, I seek to guide the students through a forward-looking intellectual history of critical race theory. Conversations thus often seek to understand the works on their own terms, identify what is new in them, and then consider contemporary applications. Finally, the students write a term paper concerning race and the law in which they apply theoretical frameworks from the course.

Madison performed well on every component of the course, earning an A. She received perfect marks on her response papers, and an A for her in-class comments. What particularly impressed me about Madison's contributions was her interest in seeing the world from new perspectives. Again and again, she described how a reading or a fellow student's insight was causing her to rethink what had been a settled understanding of the world. Given the topic of the course, such insights often involved contemplating how her positionality affected how she saw the world or how this or that legal phenomenon had down sides upon which she had not previously focused. Here, I use the world "contemplated" intentionally. There can be a tendency in a course such as Critical Race Theory for students to resist grappling with the ideas either by rejecting them out of hand or by reflexively taking them on board. Madison, by contrast, seemed to enjoy turning the ideas over and seeing where they might (or might not) lead.

Where Madison really shone was in her work on her term paper, which displayed her capacity for growth and which resulted in a grade in the A range. She chose to write on the ways that the Dobbs decision overturning Roe v. Wade had revealed racial fault lines within the pro-choice movement. Specifically, she sought to explain why more affluent white feminists became much more interested in the reproductive rights of poorer women of color after Dobbs. (Or, to put it more directly, why they had displayed relatively little concern beforehand.) As term papers go, this was a challenging topic. It required research outside of the normal legal texts available on LEXIS and Westlaw. Soon, Madison upped the challenge further by focusing on the historical choices that underlay the lack of attention. That required research that was historical as well as contemporary.

Madison succeeded in her paper by taking advantage of feedback every time it was offered. Her ultimate argument combined primary and secondary sources, spanned time frames, and involved distinct sets of actors. Getting such a story straight in her head, finding a way to convey it clearly, and identifying the stakes were all difficult. But as she submitted her topic description, then her outline, then her draft, and then her final paper, and as I pushed her on where evidence was thin or logical steps were unclear, she dug in. At each stage, the evidence was stronger and the analysis was clearer. Ultimately, she observed that the post-Roe reproductive-rights movement had emphasized winning moderates' support over addressing issues of particular concern to lower-income women of color. That meant, for instance, using the language of choice and deemphasizing questions of forced sterilization. In seeking to explain this pattern, Madison turned to Derrick Bell's notion of interest convergence. Bell argues that Black people typically only make gains when it is in the interest of White people. Adapting that frame to her topic, Madison argued that lower-class women of color were most likely to be able to make common cause with elite White feminists precisely when moderates no longer seemed like promising allies to them.

Stepping back, it is clear that Madison is on an upward trajectory. As a 1L at Washington & Lee, she scored in the top 10% of her class. Then she transferred to Michigan Law School where she has mostly received grades in the A range and no grade below B+. She has also joined a journal, devoted time to the Student Sexual Assault and Harassment Advocacy Service, volunteered during election campaigns, and undertaken clinical work.

Additionally, Madison is a lovely person. She is full of energy and good cheer and a favorite with her peers. I count myself lucky to have had her in my seminar.

I really hope you hire Madison. I would be happy to discuss Madison at greater length, and can be reached at this address, by email at samerman@umich.edu, and on my cell phone any time at 734-717-2642. Good luck with your clerkship selection

Samuel Erman - samerman@umich.edu

process. Thank you for taking the time to read this letter and to consider Madison's candidacy.

Sincerely,

Samuel Erman

Samuel Erman - samerman@umich.edu

UNIVERSITY OF MICHIGAN LAW
Legal Practice Program
801 Monroe Street, 945 Legal Research
Ann Arbor, Michigan 48109-1210

Kerry Kornblatt
Clinical Assistant Professor of Law

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in support of Madison Butler's clerkship application. Madison was a student in my Judicial Clerkships class, and I'm in a good position to speak to her substantial strengths. I am pleased to recommend Madison.

This past fall, Madison was a student in my Judicial Clerkships class. She performed very, very well and earned an A-. (The top-scoring A- in the class.) It is worth noting at the outset that Madison's fellow students in the clerkship class were not at all a typical cross-section of students at the law school. The class was designed for clerkship-interested students; it attracted a truly talented group, several of whom had already accepted clerkship positions. Earning an A- in that class means that Madison did impressive work.

Moreover, through the class, I had the opportunity to closely evaluate Madison's legal writing. (The class was only 16 people, and students did multiple writing assignments, including drafts and re-writes of a bench memo and an opinion.) Madison is a strong legal writer. She writes with clear organizational structure. Her analysis is thorough and convincing. She has a particular knack for reader-friendly elements—topic headings in long fact sections, crisp topic-sentence labels for each paragraph—that ably guide the reader through the whole document. Madison is also very skilled at absorbing constructive criticism and making adjustments.

In addition to Madison's legal writing, there are a couple of reasons I think she would make a strong clerk.

First, she will be well-prepared. Even though Madison will be coming right from law school, she will enter a clerkship with considerable experience. Through our Judicial Clerkships class, Madison has experience drafting both opinions and bench memos. She has also practiced critically evaluating the analysis of another chambers (or staff attorney) and editing the work of a judge or co-clerk. She has worked with the ethics rules that apply to clerks. She has helped interview numerous guest judges on best clerking practices and how to avoid pitfalls.

Second, Madison is both clear-eyed and passionate about the role of a judicial clerk. She and I have had multiple conversations about her clerking interest. She has a good grasp of the unique qualities of the job and the close-knit nature of working in chambers. She's expressed a real excitement about working through challenging legal problems in a collaborative way, with the only goal being to get it right. She's also told me how she sees engaging with legal issues from a neutral lens—something that many students express trepidation about—as an opportunity that will help her become a better advocate in the future. In short, I'm absolutely convinced that Madison is both deeply knowledgeable and excited about being a clerk.

For all of these reasons, I'm confident that Madison will make a great clerk. If I may be of any further assistance, please feel free to contact me.

Sincerely,

/Kerry Kornblatt/

Kerry Kornblatt
Clinical Assistant Professor of Law

WASHINGTON AND LEE
UNIVERSITY
SCHOOL OF LAW

Joan M. Shaughnessy
Roger D. Groot Professor of law

Telephone: (540) 458-8512
Fax: (540) 458-8488
E-mail: shaughnessyj@wlu.edu

April 6, 2023

Dear Judge,

I write to recommend Madison Butler for a position as one of your judicial clerks during the 2024-2025 year. During her first year in law school, Madison was a student in my Civil Procedure class at Washington and Lee before she transferred to the University of Michigan to complete her legal studies.

Madison did excellent work in my class. She was actively involved in class discussion and she wrote an outstanding final examination. She is gifted intellectually. Madison also has a strong work ethic. She excelled during her three years as a litigation paralegal at Morgan, Lewis & Bockius in Washington, D.C., receiving two awards for her work and meeting and exceeding the hours required for Morgan's Pro Bono challenge.

Lastly, Madison is committed to using law to further a just society. She was an intern for the Southern Environmental Law Center in Charlottesville, Virginia. While at Michigan, she has worked as a student attorney for the Civil-Criminal Litigation Clinic and as a class representative for the Student Sexual Assault and Harassment Legal Advocacy Service.

I am confident that Madison would be an excellent judicial clerk. She has the abilities and skills needed to contribute greatly to the work of your chambers. I recommend her without reservation.

Very Truly Yours,

Joan M. Shaughnessy

Joan M. Shaughnessy

Sydney Lewis Hall · Lexington, Virginia 24450-0303

MADISON BUTLER

315 2nd St., Apt. 415, Ann Arbor, MI 48103 • (540) 529-7928 • madisb@umich.edu

Writing Sample

This writing sample is a bench memorandum I drafted as part of a simulation for my Judicial Clerkships course during the fall semester of my second year of law school. This sample reflects light edits I made in response to an initial round of comments I received from my professor.

BENCH MEMORANDUM

To: Judge Clayton

From: Madison Butler

Date: October 20, 2022

Re: *Fisher v. RTA* (22-16123), motion hearing October 24, 2022

ISSUE AND RECOMMENDATIONS

I. **Whether Defendants created a designated public forum in their bus advertisement space.** Not likely. Depending on the weight the court gives Defendant's acceptance of some political and public-issue advertisements, Defendants did not likely designate a public forum in the advertisement space. Most of the other factors used to determine forum type weigh in favor of a nonpublic forum.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Katherine Fisher ("Ms. Fisher" or "Plaintiff") filed this Motion for Preliminary Injunction and/or Temporary Restraining Order against Defendants Greater Cleveland Regional Transit Authority ("RTA") and Joseph Calabrese ("Mr. Calabrese") (collectively "Defendants"). RTA is a government entity operating the public transit system for the Cleveland area and Mr. Calabrese is the General Manager and Chief Executive Officer of the RTA. Compl. ¶¶ 10, 12. Plaintiff brought this lawsuit alleging that Defendants violated her First Amendment right to freedom of speech and expression under 42 U.S.C. § 1983 by rejecting her proposed bus advertisement. *See* Compl. ¶ 38.

I. RTA's Advertisement Policy

RTA established an advertising program policy that states that the purpose is "to provide revenue for the RTA while…maintaining RTA ridership and assuring riders…a safe and pleasant environment." Ex. 4. The policy also states that RTA "does not…intend

to create a public forum[]" and reserves the right to approve all advertisements. *Id.* RTA's policy also prohibits any advertisement which: depicts or promotes illegal activity, advocates violence or crime, infringes copyright, supports or opposes the election of any political candidate, or scorns an individual or group of individuals. *Id.*

When RTA receives an application for an advertisement posting, a third-party contractor first reviews the advertisement. *See* Calabrese Hr'g Tr. 17:21-4. The contractor determines certain logistics such as the cost to run the advertisement, vehicle routes, and where the customer wants the advertisement posted. Calabrese Hr'g Tr. 18:1-4. The contractor then forwards the advertisement proposals to Mr. Calabrese who reviews them to determine if they comply with RTA's policy.

II. Events leading to this action

Ms. Fisher has been engaged in environmental activism since she was a young child. *See* Fisher Hr'g Tr. 4:7-7:15. Ms. Fisher has participated in wetland restoration, campaigned to make her school and town more environmentally friendly, and has attended a national sustainability conference. *See* Fisher Hr'g Tr. 5:4-7:15. Her passion for the environment led her to apply to post an advertisement in the advertising spaces on the buses in her community. *See* Fisher Hr'g Tr. 8:16-9:6. Ms. Fisher's proposed advertisement states "People who don't recycle are TRASH. By not doing your part you are stealing the future from your children and grandchildren." Ex. 1.

Ms. Fisher submitted her proposed advertisement to RTA, which was then reviewed by a third-party contractor. *See* Calabrese Hr'g Tr. 17:21-18:4. Per RTA's review procedure, the contractor forwarded Ms. Fisher's advertisement to Mr. Calabrese who has reviewed advertisements for compliance with RTA's policy for fourteen years. *See* Calabrese Hr'g Tr. 17:16-19:7. Mr. Calabrese reviewed and rejected Ms. Fisher's advertisement because it violated RTA's prohibition of scornful advertisements. Ex. 2. Ms. Fisher requested reconsideration of her advertisement, which was also reviewed and rejected by Mr. Calabrese for the same reason. Ex. 3. Mr. Calabrese said that it was apparent to him that the advertisement was scornful because it called people "trash" and accused them of stealing the future from their children and grandchildren. *See* Calabrese

Hr'g Tr. 25:12-7. Ms. Fisher maintains that strong wording is necessary to get her point across that environmental action is needed. *See* Fisher Hr'g Tr. 10:10-7.

Before Ms. Fisher's proposed advertisement, Mr. Calabrese rejected four other advertisements. *See* Calabrese Hr'g Tr. 19:9-10. Two of the rejected advertisements violated the prohibition of advertisements for political candidates, and he couldn't recall why he rejected the others. *See* Calabrese Hr'g Tr. 19:15-20:10. None of the other rejections were for a scornful message. Calabrese Hr'g Tr. 19:15-7. Despite the low number of rejections, Mr. Calabrese maintains that he does not simply rubber stamp all the advertisements. Calabrese Hr'g Tr. 22:8-11. Also, there was one advertisement prohibited by the policy that Mr. Calabrese mistakenly approved. Calabrese Hr'g Tr. 19:13-4. In 2009, RTA ran an advertisement for an extreme sports company that promoted bungee jumping off Brecksville-Northfield Bridge. Calabrese Hr'g Tr. 20:12-6. The bridge was on land owned by a national park that prohibited such activity on its property. Calabrese Hr'g Tr. 20:18-9. Therefore, the extreme sports advertisement violated RTA's policy for promoting illegal activity. Calabrese Hr'g Tr. 20:19-20.

DISCUSSION

I. Whether Defendants created public fora in their buses' advertising spaces.

Defendants did not create public fora in their advertisement spaces. "The Supreme Court has adopted a forum analysis for use in determining whether a state-imposed restriction on access to public property is constitutionally permissible." *United Food & Commer. Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*,163 F.3d 341, 349 (6th Cir. 1998). There are three types of fora: traditional public, nonpublic, and designated public. *See Id.* at 350. The level of scrutiny applied to the government's restriction is determined by whether the advertisement space is designated a public or non-public forum. *See Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, 698 F.3rd 885, 890 (6th Cir 2012). If the forum is deemed public, the Court will evaluate Plaintiff's claim using strict scrutiny, and the exclusion of the speech will only be allowed if "necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *United Food,* 163 F.3rd at 350 (quoting *Cornelius v.*

NAACP Legal Defense and Education Fund, 473 U.S. 788, 800 (1985)). If the forum is deemed nonpublic, the exclusion of the speech will be allowed "as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* The parties here agree that RTA's bus advertising space is not a traditional public forum. Pls.'s Br. 13. However, the parties disagree as to whether RTA designated the bus advertisement space a public forum, or if the advertisement space is a nonpublic forum.

Accordingly, the analysis turns to "whether the government intentionally opened the forum for public discourse." *Am. Freedom Def. Initiative*, 698 F.3rd at 890 (citing *United Food,* 163 F.3rd at 350). Courts use a two-step analysis to determine whether the government intended to create a public forum. *United Food*, 163 F.3rd at 352.

The Court first assesses "whether the government has made the property generally available to an entire class of speakers or whether individual members of that class must obtain permission in order to access the property." *Id.* Second, the Court assesses "whether the exclusion of certain expressive conduct is properly designed to limit the speech activity occurring in the forum to that which is compatible with the forum's purpose." *Id.* In other words, the Court is "guided not only by the government's explicit statements, policy and practice, but also by the 'nature of the property and its compatibility with expressive activity…'" *Am. Freedom Def. Initiative*, 698 F.3rd at 890 (quoting *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 802 (1985)) (internal citations omitted).

Where the government leaves a space generally open to a class of people, the Court "will infer intent to designate property a public forum." *United Food*, 163 F.3rd at 350. But, where the government has a policy of being selective or requiring permission to post advertisements, the Court is less inclined to find intent to designate the property public. *Id.* However, whether the government states that the property is not public or limits who can use the property by requiring permission is not dispositive. *Id.* at 350-51. The Court will also assess the relationship between the purpose of the forum and the reason(s) for the restriction to access the forum. *Id.* at 351.

In *United Food*, SORTA, a state-operated transit authority, rejected a union's request to post an advertisement on their bus displaying pro-union statements. *Id.* at 347. SORTA previously allowed the union to post an advertisement on their bus displaying similar pro-union messages. *Id.* at 346. Between the posting of the union's first advertisement and the rejection of their second advertisement, the union conducted a protest that resulted in the police being called. *Id.* SORTA subsequently rejected the union's second advertisement request stating that the advertisement was "unacceptable because it was aesthetically unpleasant and controversial, and it may therefore adversely affect SORTA's image and its ability to attract and maintain its ridership." *Id.* at 347. SORTA also "objected to the ad's photograph, which it described as a 'photograph of a mob of persons…'" *Id.* However, the only material difference between the two advertisements was the color – the first advertisement was blue, and the rejected advertisement was red. *Id.*

Even though SORTA required permission to display ads on their buses, the court found that the government created a public forum. *Id.* at 355. The court first assessed whether SORTA made its advertising space generally available to the public. *Id.* at 352. The court determined that "SORTA's stated intent to operate its advertising space as nonpublic, without more, is [not] dispositive..." *Id.* The court looked into whether SORTA consistently enforced its policy of requiring permission to post advertisements. *Id.* at 353. The court explained, "[b]ecause UFCW has not identified any advertisement accepted by SORTA that arguably violated the Policy, we have no reason…to believe SORTA applies its written policy on an ad hoc basis." *Id.* at 353. Further, the court heeded the trial court's factual determination that SORTA only rejecting six advertisements was not an indication that it granted permission as a matter of course. *Id.* Accordingly, the court moved to the second factor to determine the type of forum SORTA created. *Id.*

In analyzing the second factor, the court found that its actions and policies demonstrated that SORTA intended to designate the advertising space on the buses a public forum. *Id.* One important consideration was that SORTA allowed virtually all types of political and public-issue advertisements. *Id.* at 355. Also, the court found that "the lack of

definitive standards guiding the application of SORTA's advertising policy permits SORTA…to reject a proposed advertisement…for any reason." *Id.* at 354. The court also found that SORTA's stated purpose of "exclud[ing] expressive activity that would hinder the forum's larger purpose -- the provision of safe, efficient, and profitable Metro bus services" to be "tenuously related, at best, to the greater forum's intended use." *Id.* To emphasize the lack of a causal link between SORTA's policy's purpose and its exclusion of controversial or aesthetically unpleasant advertisements, the court explained, "[a]lthough political and public-issue speech is often contentious, it does not follow that such speech necessarily will frustrate SORTA's commercial interests." *Id.*

Conversely, in *American Freedom Defense Initiative*, the court found that SMART, a state-run transit authority, did not establish a public forum in its advertisement space on its buses. *See Am. Freedom Def. Initiative*, 698 F.3d at 892. SMART rejected an advertisement submitted by American Freedom Defense Initiative (AFDI) depicting "anti-jihad" sentiments. *See Id.* at 889. SMART's advertisement policy included an exclusion of "political or political campaign advertising," which was the exclusion applied to AFDI's rejected advertisement. *Id.* Despite SMART's policy not explicitly stating that the advertising space was not a public forum, the court reasoned that SMART's ban on political advertisements and limits to nonpolitical advertisements "make the space incompatible with public discourse, assembly, and debate that characterize a designated forum." *Id.* at 890. Accordingly, under the first factor, the court found that SMART did not designate the advertisement space a public forum. The court noted that the Supreme Court found a similar restriction on political speech to create a nonpublic forum in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), wherein a city rejected all political advertisements submitted for display on its transit vehicles. *Am. Freedom Def. Initiative*, 698 F.3d at 890 (citing *Lehman*, 418 U.S. at 299).

For the second factor, the *American Freedom Defense Initiative* court found that the relationship between SMART's policy's purpose of generating revenue and the excluded speech weighed in favor of a nonpublic forum. The court noted that allowing political discussion in the advertisements on the buses could open SMART to advertisements for

highly problematic groups such as neo-Nazis, which could lead to a reduction in revenue and ridership. The court stated, "[t]he reason for the restrictions ties directly to the purpose of the forum—raising revenue—and therefore indicates that SMART wanted to establish a nonpublic forum instead of opening the forum to the public." *Id.* at 892.

In our case, the first factor weighs in favor of RTA. Like in *United Food* and *American Freedom Defense Initiative,* RTA subjects its potential advertisers to an application and review process. Also, RTA's policy goes further than SMART's by expressly stating its intent to not create a public forum. Ex. 4. However, as the court in *United Food* expressed, without more, the government's stated intent is not dispositive. *See United Food*, 163 F.3d 352. The Court will thus review the consistency of RTA's enforcement of the policy.

Plaintiff argues that RTA's low number of rejections indicates that RTA "granted virtually unlimited access to the advertising space." Pl.'s Br. 14. Plaintiff compares the low number of RTA rejections to SORTA's low number of rejections in *United Food*. However, the court in *United Food* only briefly mentioned this fact and it was not one of the issues that decided the case. *United Food*, 163 F.3d at 353. Meanwhile, Defendants maintain that they review every advertisement and apply their policy consistently. Def.'s Br. 12. Defendants seem to contend that the low volume of rejections is a result of its short list of exclusions, however, I would recommend seeking clarity on this point. Ultimately, the low number of rejections seems relatively inconsequential to the determination of the forum type.

Plaintiff also argues that Defendants inconsistently applied their policy because they allowed one advertisement with prohibited content to slip through the cracks. However, I tend to agree with defendants and the court in and *American Freedom Defense Initiative* that "'[o]ne or more instances of erratic enforcement of a policy does not itself defeat the government's intent not to create a public forum.'" *Am. Freedom Def. Initiative*, 698 F.3d at 892 (quoting *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65,78 (1st Cir. 2004)). Also, that the illegal activity in the inadvertently approved advertisement was not obvious illegal

activity leans in favor of being a genuine mistake rather than an intention to create a public forum.

The second factor also weighs mostly in favor of RTA. The purpose of RTA's advertising policy is to generate revenue, maintain ridership, and ensure a safe and pleasant environment for the riders. Ex. 4. Ms. Fisher's proposed advertisement calls riders who do not recycle "trash" and accuses them of stealing from their children and grandchildren. *See* Ex. 1. The advertisement engages in name-calling and accusatory language that will likely offend many riders, which could result in reduced ridership and disturb the pleasant environment for which RTA strives. Further, if ridership reduces, other advertisers may determine it's not worth their money to advertise on RTA's buses. Other advertisers also may not want to be associated with a transit system that allows for signage that insults its riders. Ultimately, RTA's purpose for excluding scornful language could be defeated by Plaintiff's advertisement. Like in *American Freedom Defense Initiative*, the relationship between RTA's policy's purpose directly relates to the exclusion of Plaintiff's speech.

Plaintiff also argues that, since RTA allowed political and public-issue advertisements, it opened its space to the public like in *United Food*. While RTA does allow political and public-issue advertisements, it imposes restrictions on such advertisements. *See* Ex. 4. RTA's policy seems to fall somewhere between the policies in question in *United Food* and *American Freedom Defense Initiative*. RTA restricts advertisements advocating for specific political candidates but allows advertisements advocating for specific political issues. Ex. 4. RTA's advertisement policy does not open the advertisement space entirely for political advertisements, but it does open the advertisement space for discourse about political and public issues. *See* Calabrese Hr'g. Tr. 21:17-20. Like in *United Food*, the acceptance of political advertisements may show a willingness to designate the advertisement space a public forum and weigh in favor of Plaintiff's argument. On the other hand, the fact that RTA does have some restrictions on political advertisements demonstrates a lack of willingness to create a public forum. So, this consideration could go either way. However, this seems to be one of the only considerations possibly weighing in favor of Plaintiff's argument. With most other

considerations weighing in favor of a nonpublic forum, this consideration seems to be likely inconsequential.

Lastly, the Court may also review the clarity of RTA's policy to assess its intent to create a public forum. Plaintiff argues that, like the policy in *United Food*, RTA's policy is not definitive and open to subjectivity. Pl.'s Br. 13. However, RTA's policy of not allowing scornful advertisements is more specific and objective than SORTA's policy against advertisements that are "aesthetically unpleasant and controversial." "Scorn" is defined as "open to dislike and disrespect or mockery often mixed with indignation," "an expression of contempt or derision," or "an object of extreme disdain, contempt, or derision: something contemptible." *Scorn*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/scorn (last visited Oct. 5, 2022). Meanwhile, "controversy" is defined as "a discussion marked especially by the expression of opposing views" and "unpleasant" is defined as "not pleasant: not amiable or agreeable." *Controversy*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/controversy (last visited Oct. 5, 2022), *Unpleasant*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/unpleasant (last visited Oct. 5, 2022).

SORTA's policy did lack definitiveness and was subjective, which allowed it to use the policy as a pretext in *United Food*. But, as the definitions suggest, RTA's policy is not open to subjectivity to the same degree as SORTA's. Objectively, calling people "trash" and accusing them of "stealing from their future children and grandchildren" falls within the definition of scorn. What is considered "controversial" and "aesthetically unpleasant" may change based on the opinion of the person viewing the advertisement. Generally, name-calling is considered a demonstration of scorn toward a person or people regardless of the viewer. RTA's restriction against scornful advertisements is not so vague or subjective as to allow RTA to use the policy as a pretext to deny an advertisement. Accordingly, the second factor weighs in favor of RTA's advertising space being a nonpublic forum.

With both factors of forum analysis weighing in favor of Defendants, Defendants did not create a public forum in RTA's advertisement space. RTA's policy specifically

states that it does not intend to create a public forum. While its expression is not dispositive, there is little evidence that RTA enforced its policy inconsistently. Further, RTA's policy's purpose is clear and directly related to its reason for rejecting Plaintiff's advertisement. RTA's policy of allowing some political or public-issue statements is a consideration that may weigh in favor of the Plaintiff and may be an issue to tease out at oral argument. Overall, most of the forum-determining considerations weigh in favor of RTA not creating a public forum.

Applicant Details

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Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Journal of Transnational Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Foundational Moot Court**

Bar Admission

Prior Judicial Experience

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